

**UNCOVERING THE BLIND EYE OF LADY JUSTICE THROUGH THE MINDS  
OF POWER**

A Thesis

by

CANDICE LASHELL HILL

Submitted to the Office of Graduate Studies of  
Texas A&M University  
in partial fulfillment of the requirements for the degree of

MASTER OF SCIENCE

May 2012

Major Subject: Sociology

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Approved by:

Chair of Committee,	Joe Feagin
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## **ABSTRACT**

Uncovering the Blind Eye of Lady Justice Through the Minds of  
Power. (May 2012)

Candice LaShell Hill, B.S., The University of Central Missouri

Chair of Advisory Committee: Dr. Joe Feagin

This thesis focuses on a relatively new manner of looking into the discretionary decisions implemented by powerful social actors —judges, prosecutors, and police officers— resulting in detrimental effects for African Americans in the criminal justice system. While it is common to look into inequality in the system, there has not been much research done on the frame of thinking of these actors when making these decisions. This study will develop the concept of the “white framing model” while simultaneously demanding change. The white framing model will be developed by linking four theoretical concepts the white racial frame, systemic racism, interest convergence, and Eurocentric law. This thesis found the thinking of these actors from this frame has resulted in surmountable amounts of discrimination and a disproportionate amount of African Americans in prison. Seventy percent of African Americans have reported an experience of a discriminatory nature compared to 36% reported by their white counterparts in their lifetimes. These discriminatory acts are often experienced through interaction with law enforcement agencies that are in place to provide social order. Further results show the overall consequences for black men were being imprisoned 11.8 times more than whites. This study provides evidence that uncovers the covert racist nature of the criminal justice system that can be ignored by the untrained eye. Future work will involve change in policies, people holding these positions, and implementation of these solutions. These policy implementations include demanding a critical mass of African Americans to occupy powerful social positions, and the implementation of programs to reflect assistance for people of color. These solutions

will not only provide a representative sample in criminal justice positions, but also make a difference in a system that is often unjust to people of color.

## **DEDICATION**

To God, my children, mother, the memory of my grandfather, my family, and all of the people that have played a major role in helping me to reach my goals.

## **ACKNOWLEDGEMENTS**

I would like to thank my committee chair, Dr. Feagin, and my committee members, Dr. Foster, and Dr. McIntosh, for their guidance and support throughout the course of this research.

I would also like to thank the department faculty and staff for providing a comfortable family feel for my time at Texas A&M University. This has contributed to making my experience memorable.

I would like to thank my daughters for standing strong and taking this journey with me. Thanks go out to my parents for providing me with the utmost support and love. Finally, I would like to thank my sisters for their encouragement and patience to listen to me and walk with me through my struggles.

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## CHAPTER I

### INTRODUCTION: THE IMPORTANCE OF RESEARCH

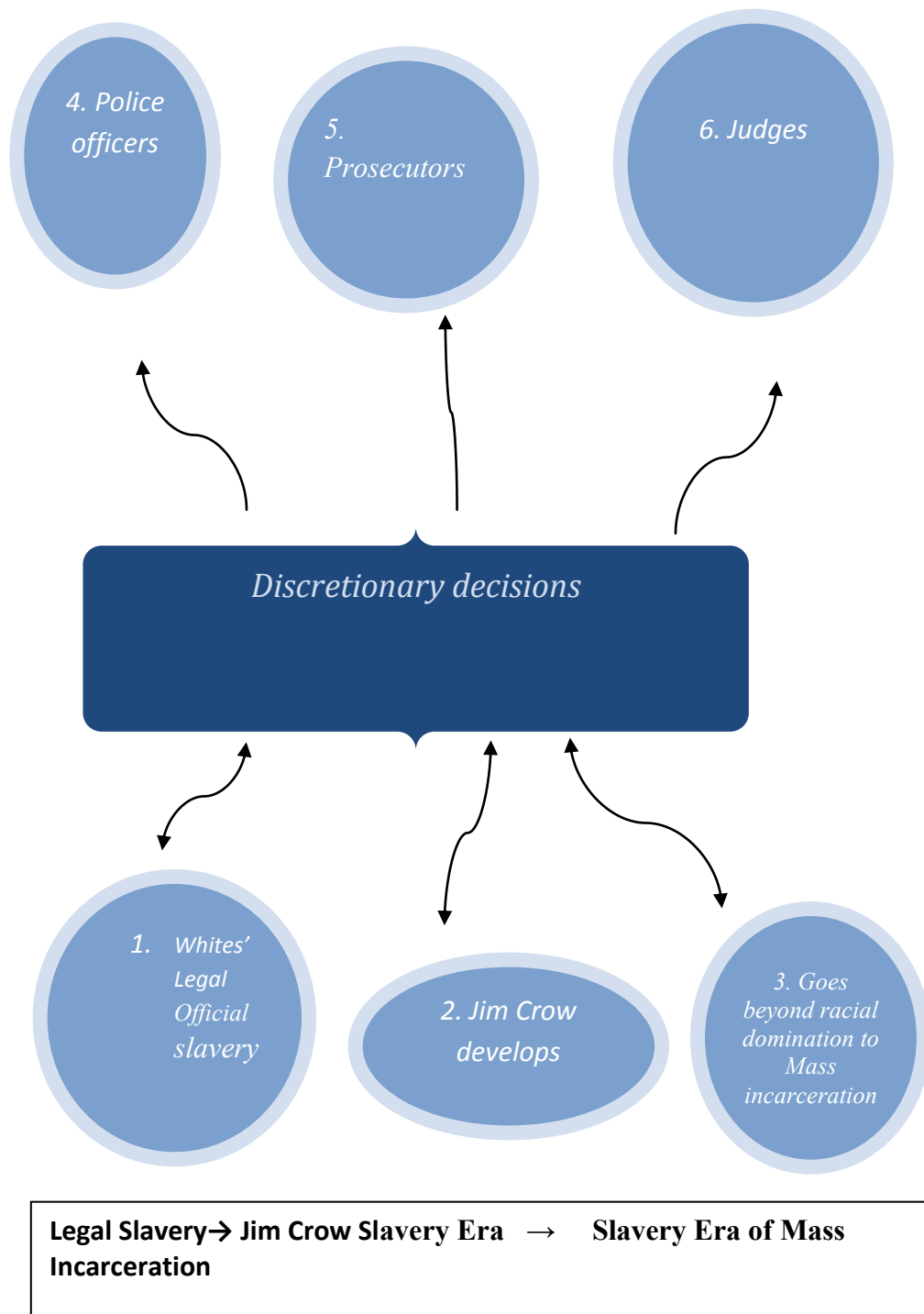
This thesis will provide a very important contribution to the field of sociology with the addition of a new conceptual framework. The concept I am developing is the “white framing model.” This concept will explore the mode of thinking of powerful social actors (judges, prosecutors, and police officers) that can have an adverse effect for African Americans. I will develop this concept by linking the white racial frame, systemic racism, interest convergence, and the Eurocentric foundation to the mode of thinking of white social actors in the criminal justice system. The white framing model embodies a historical foundation grounded in white mans’ Eurocentric law, have changes made when the interest of whites converge, are grounded in the systemic racist criminal justice institution, and encompass a white racial frame of mind. A combination of one or more of these aspects results in a white framing model of the criminal justice system.

Figure 1 is representative of my theoretical contribution to fill a major gap in the disciplines of sociology and criminology. The core (center) of this figure represents aspects of discretionary decisions are grounded from white racist framed ideology. This ideology is based on the beliefs of whites as superior and blacks as inferior leading to negative consequences at the expense of black people. The core represents the embedding of the white framing model ideology as an aspect present in the making of discretionary decisions. The surrounding aspects of this figure represent a back and forth exchange between the systems and people in place effecting aspects of the core to ensure these core beliefs are representative in the day to day actions of society. Element 1 represents the basic legal slavery system that began to embed dominate whites perspectives in society. Through the implementation of the systemic criminal justice

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This thesis follows the style of *Criminal Justice Review*.

institution that has implanted black narratives and emotion-laden stereotypes ingrained. Element 2 represents the next phase devised as a system based from the same initial values and stereotypes of the previous institution however, the name of this institution is altered. This institution is labeled Jim Crow. This system holds the same values of the previous racist system with the addition of a covert manner of acting towards whites through an unjust sense of entitlement regardless of their racist actions. Element 3 is the current system in place today that also has an alteration of the name however, the same core belief systems (white racial mindset) remains in place. These three elements provide a reciprocal effect represented with the admission of the arrows provide the view of these discretionary decisions based from the core beliefs and adversely effecting black people. Element 4 represents the police officers duty in making discretionary decisions. These decisions based from the embedded white racial frame of thinking that lie in the core of this figure. These actions are seen through the discriminatory arresting practices conducted by these white men in power. These decisions are representative of embedded beliefs that are a part of systems (1, 2, and 3). Element 5 represents the role of the prosecutor in this discretionary process. These decisions are based on the discretionary power to charge, convict, or dismiss a case. This element also provides embedded beliefs as a part of elements (1, 2, and 3). Element 6 represents the role of the judge when making discretionary decisions. These discretionary decisions include the power of the judge to provide harsher sentences. As with elements 4 and 5, this element also embodies the embedding of the components of elements 1, 2, and 3. The final section of the chart provides insight into the intergenerational transmission of the aspects of the white racial perspective inserted in the minds of white when making discretionary decisions. The first aspect of the frame was present in the overt racist legal slavery era. The next level from which these same politics were transmitted was the Jim Crow slavery era. The final system is the system currently in place the era of mass incarceration. Although this era has a covert manner of transmitting this white racial frame, the same aspects of the white racial frame remain.



**Figure 1**

Dimensions of the criminal justice systems discretionary process

Research in the disciplines of sociology and criminology has been conducted on the relationship between the criminal justice system and racial disparities. However, there is a major gap in the literature. This gap entails the lack of discussion regarding the reasons these racial disparities exist. A theoretical examination of the perceptions or frame from which white actors behind the scenes (judges, prosecuting attorneys, and police officers) view crime, criminals, and the role of the criminal justice system, and how these views effect their discretionary decisions will be provided. My research will provide a lone contribution of theoretically linking the mode of thinking of powerful white actors when making discretionary decisions from a white framing model. I will provide insight into the identity of the social actors (judges, prosecutors, and police officers) behind decision making in the discretionary process. A statistical view will be provided to represent the percentage of social actors that play a major role in making these decisions. Insight will be provided on the pressure black officers find themselves in when making these discretionary decisions to act outside of the white framing model.

The first actor positioned in making discretionary decisions will be identified as the police officer. The officer will be described as the decision maker behind whether to arrest someone once the individual is identified as a potential suspect. I will fill in the theoretical gap behind the linking of the frame of mind of the police officer when making rash decisions that can lead to disparities. I will also provide a connection to the next level of discretion in the hands of the prosecutor as a contribution to the field. The prosecutor has discretionary options to dismiss cases, return the case to the police with the demand of needing more evidence, begin investigations of their own, or proceed to the next step in the case. When choosing to make the next step and keep the case in the system the prosecutor is provided the opportunity to plea-bargain along with an array of deals as to the appropriate charge and sentence. The last discretionary level in this process I will provide is information on the position of the judge. This study will fill the gap with much needed investigation into the discretionary power of the judicial system. The judge determines whether there is a requirement of bail, the amount of bail, and whether to find the defendant guilty or innocent. The judge also decides after conviction



how severe the sentence will be. Providing levels of discretion can be viewed as helping the system to maintain stages of flexibility and individualism. However, there is also the possibility of opening the system to disparate treatment according to the suspects' race. There will be a glance into the formal process that each of these three positions is required to maintain in this discretionary process.

An introduction of the role these white discretionary actors play leading to discretionary problems will be provided. There will be an addition to the amounts of inequitable discretion used on the levels of police officers, prosecuting attorneys, and judges that are absent in the current literature. My research will indict all three levels (judges, prosecuting attorneys, and police officers) of the white social actors that are making current discretionary decisions. I am suggesting we “examine the actors.” Current criminological analyses would be helped with the incorporation of theoretical — systemic racism, white racial frame, Eurocentric law, and interest convergence— perspectives. I will discuss this as powerful white social actors thinking from the white framing model. This study will provide an explanation on a psychological level, from the white mind perspective, through examining beyond the statistical findings in criminology and examining the core of “why” the problem of inequality through discretionary decisions exists.

This study will fill a needed gap regarding the absence of significant information on the racially motivated minds of the decision makers. There will be information provided on a new perspective glimpse into systemic racism, the white racial frame, the interest convergence principle, and Eurocentric law. This information will be provided from a theoretical aspect, white framing model.

Systemic racism will be defined in detail in this study. I will give a focus of the white mind by providing a psychological approach through demonstrating the manner in which the white racial frame encompasses the white racial mind of these powerful social actors (police officers, prosecutors, and judges). There will be a glimpse into the emotion-laden stereotypes embodied in the mind when viewing people from this systemic view. The inclusion of emotion-laden stereotypes of criminality to emphasize

the bestial and apelike appearance, uncivilized, alien, foreign, criminal, dangerous, and rebellious aspects of the black man as embedded in this system will be discussed.

The white racial frames vantage point will be addressed. The viewing of society by whites and the way in which they interpret society will be provided. This point of view will be related to the thinking of powerful social actors in the systemic racist criminal justice system when making discretionary decisions. The dimensions expressed of the white racial frame (Racial stereotypes (a verbal=cognitive aspect); Racial narratives and interpretations (integrating cognitive aspect); Racilized emotions (the “feelings” aspect); Racial images (the visual aspect); and Inclinations to discriminatory action) will be explored. These aspects will be discussed as having created (historical connection) or reformulated (through the discretionary decisions) the legitimizing white framing model. This frame will be discussed as a demonstration of the perception of whites being superior, full of virtue, and moral goodness. This connection will be shown by the provision of examples of white powerful social actors thinking from this frame when making discretionary decisions. A look into the detrimental treatment and bias towards African Americans will be discussed.

My study will also provide a view of the European/ English common law that is the origin and maker of our laws in place today. This law is made from English common law. The addition of the foundation of the law as distinctly a factor of the white mans produced legal tradition will provide a connection to the mode of thinking of white social actors. Kenneth Nunn’s perspective will provide the missing foundational component that drives the systems and lawmakers (powerful whites) when making these discretionary decisions. This connection will be a lone contribution of the current study. The description of the legal tradition as a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught will be addressed.

This study will provide a missing foundational explanation for decision makers actions that are clearly missing from current literature in connection to the discretionary

based thinking of these white social actors. My project achieves its' goal, providing the missing foundational piece of inequality blacks experience in the criminal justice system. This is accomplished by pointing out the key actors (powerful elite white men) who are implementing these policies.

Discretion will be defined as a necessary factor to provide maintenance patterns for the system. The ways in which discretion is used when making discretionary decisions by white powerful social actors' will be addressed. These actors will be defined as using discretion as needed however; this study will provide insight into the direct effect the misuse of discretion can have on African Americans. The addition to the discipline of providing the focus on each position (police officers, prosecutors, and judges) in the systemic racist justice system will be given.

A glance into the personal discretion as a daily aspect of police officers will be provided. When these discretionary decisions are being made how officers decide which suspects are provided the option to go home versus which suspects they choose to arrest are usually the topics of research. This study will provide the addition of a theoretical aspect, white framing model, to making discretionary decisions through the white racial frame of mind sheds light on why these daily discretionary decisions are made as well as who finds themselves negatively affected.

A glance will also be provided into the discretionary ideology of the prosecutor. This ideology carried by the prosecutor will be shown as producing both positive (from the prosecutors' perspective) and negative (through their actions against blacks) power. Positively they (prosecutors) are given passes through legal rules such as the "harmless error rule." The negative aspect of this discretionary power through the white racial frame of mind leads to misconduct and injustices for black defendants. These miscarriages will be discussed as including decision-making factors (system factors, case factors, disposition factors, and political factors), and presidential pardons.

A glance will be provided into the discretionary power of judicial discretion. Although their authority will be discussed as having the least amount of power, this position will be viewed as critical for African Americans. This view into the judicial

process will add to this discipline by providing a glance into an agency of the discretionary decisions through the white racial frame that are rarely studied, judicial discretion.

My study will also examine broader consequences of criminal justice system discretion in relation to the vast penal system in the United States. There will be a glance into the historical consequences (lynching) for blacks when discretionary decisions of justice are made by powerful whites. These consequences will include growing inequality for black people who are chosen (through inequality in discretion from the white framing model) to serve time, and the phenomenon of governing through crime with use of three strikes law, tough on crime, and truth in sentencing. These consequences will be discussed in relation to the possible adverse effect for black men leading to mass incarceration. There will also be a brief synopsis provided on the impact and foundational backing when viewing discretionary decisions rooted from a white racial frame of mind in relation to the war on drugs. A historical account of the war on drugs being created from this frame of mind will be addressed.

I will provide many additions to the discipline in the aspect of discretion made from powerful white actors. This study will answer age-old questions that are important in any issue that must be addressed. The gap filled through this study will answer “who” these decision makers are, “how” (what frame of mind) they are thinking, “and “why” they are thinking in this manner that is detrimental to African Americans.

## CHAPTER II

### NEW THEORETICAL / FOUNDATIONAL ADDITION

Research has been conducted on the criminal justice system and racial disparities. However, there is a major gap in the literature to discuss the reasons behind these disparities. Theoretically examining the perceptions or frame from which white actors behind the scenes (judges, prosecuting attorneys, and police officers) view crime, criminals, the role of the criminal justice system, and how these views effect their discretionary decisions. The police officer is the first level bureaucrat in the discretionary justice process. His position will be discussed as deciding the fate of a suspect. The next level of discretion will provide a view from the prosecutorial aspect the next discretionary level. The prosecutors' has discretionary options to decide to move further with or dismiss the case. The last discretionary level in this process to be discussed will be the judge. The judge will be argued to have the ability to convict, provide a harsher sentence, and determine guilt or innocence. These provisions of discretionary power can be viewed as helping the system to maintain stages of flexibility and individualism. However, there is also the possibility of opening the system to disparate treatment according to the suspects' race.

This chapter will provide insight for linking the white minds of power (judges, prosecuting attorneys, and police officers) to racial disparities and validate the need to accept accountability. Ideally, the criminal justice system provides the role of punishing and identifying those who commit criminal offenses and ensuring they are reprimanded to decrease the likelihood they will become repeat offenders. The result would be to protect the community in the process. However, in practice the criminal justice system provides differential treatment for African American people versus their white counterparts. When considering inequality in the criminal justice system there is a question of what is the theoretical linkage among powerful whites in making discretionary decisions? To answer this question I will theoretically link their mindset. This chapter will focus on the racially motivated minds of the decision makers' by providing a connection to systemic racism, the white racial frame, the interest

convergence principle, and Eurocentric law that assist in discretionary decisions. This incorporation of theories will result in the mindset of the white framing model.

### **Who are the Actors**

According to the United States Census (2012) bureau employed civilians by occupation, sex, race, and Hispanic origin, blacks are underrepresented in relation to the population in the occupation of attorneys, the stage where the amount of discretion is at the highest level. In the occupation of attorneys, blacks represent 4.3, Asians represent 3.4, and Hispanics represent 3.4. This leaves a percent of 88.9 for whites. These statistics support the notion that these powerful critical decision maker positions are dominated by whites. These figures are representative of attorneys in general and are not specific to the position of prosecutor. I have searched extensively to find an accurate number of black prosecutors. I think it is fair to say at this point that no one keeps these specific numbers separated for prosecutors and district attorneys. I have been provided a rough estimate from a few prosecutors that hold knowledgeable positions. One prosecutor provided numbers for the district attorneys in Dallas at roughly 1%. Another knowledgeable source provided an estimate stating that out of approximately 8 dozen prosecutors at his firm five are black. This is equivalent to about 4% African Americans in total employed through his firm. Another knowledgeable source provided an estimate for his firm stating out of 7 dozen prosecutors only two were African American. In the form of percentages of African Americans in his firm, this would translate in numerical terms of 3%. According to an estimate by Wayne McKenzie, a former prosecutor from Brooklyn and the past president of the National Black Prosecutors Association (NBPA) estimates the number of black prosecutors nationwide at about 40, not including U.S. attorneys who work for the federal government (Valbrun, 2012).

In my extensive search for the percentages of judges, I found the numbers to be astonishing. “Only 3.8% of all state court judges are African American. Among state trial court judges, only 4.1% are African American. In jurisdictions with large African American populations, the figures are disturbingly similar. In New York State, for example, only 6.3% of the state's judges were African American in 1991, although

African Americans constituted 14.3% of the state's population. 4 In Georgia, where 27% of the population is African American, only 6% of the state's judges are African American.” (Ifill,1997). These findings provide a glance into the lack of equal representation of trial judges in relation to the population of African Americans.

In my search for racial statistics of police officers, I found statistics divided by race from Lemas 1993 separated by state police agencies. The percentages for African American police officers in the states of Vermont, Maine, and Montana they reported a percentage of 0.00 for African American police officers. Three other states reported percentages of 6.7 for Texas, 7.2 for Missouri, 3.7 for Washington. In the cases of all six states, none of the statistics shows African American police officers employed as representative numbers for the percentage of African Americans in the population. The most recent data produced was in 2000. The Lemas report finds African American males represent 8.64 % and African American women represent 1.74%. These statistics show African American police officers are not representative in relation to their percentage of the population ( National Institute of justice, 2010).

According to the 2010 Census Bureau, the data of the national population by race whites represent 72.4 %, blacks represent 12.6%, Asians represent 4.8%, and Hispanics represent 16.3% of the total population. In the above findings, blacks are statistically underrepresented in relation to their percentage of the population.

Police officers are viewed as the first level bureaucrat in making discretionary decisions. Despite African American police officers being employed as powerful social actors we see pressure being applied to the officers to act out of the white framing model. The problem is all criminal justice institutions at the state and federal court system levels are extremely white. Even if there are a few blacks, they are not representing a critical mass. The critical mass suggests there are enough blacks in position to embody power to encourage whites to listen to them and ultimately result in a level of change. The book *black in blue* (2004) found whites, blacks, and Asian officers are forced to conform to the “blue culture” of thinking. “The “blue culture” is usually very strong and thereby creates a pressurized environment where conformity to the

white-determined informal norms is highly valued.” (Bolton & Feagin, 2004). A study conducted in England in 1997 through interviews with several dozen black and Asian officers found they were to maintain categories and know their “place.” The categories of hierarchy to be maintained were through the pressure stemming from police occupational culture that officers of color are expected to conform to white-determined racial categories. These categories inform relationships within police contexts and with the public. This affirms officers of color are required to maintain a white dominated level of thinking when making decisions. The findings of these statistics support the importance of looking at discretionary decisions as grounded in the white framing model. Theoretically, linking disparities to the white minds behind the scenes (judges, attorneys, and police officers) in the criminal justice system are essential.

### **Formal Discretionary Criminal Justice Process**

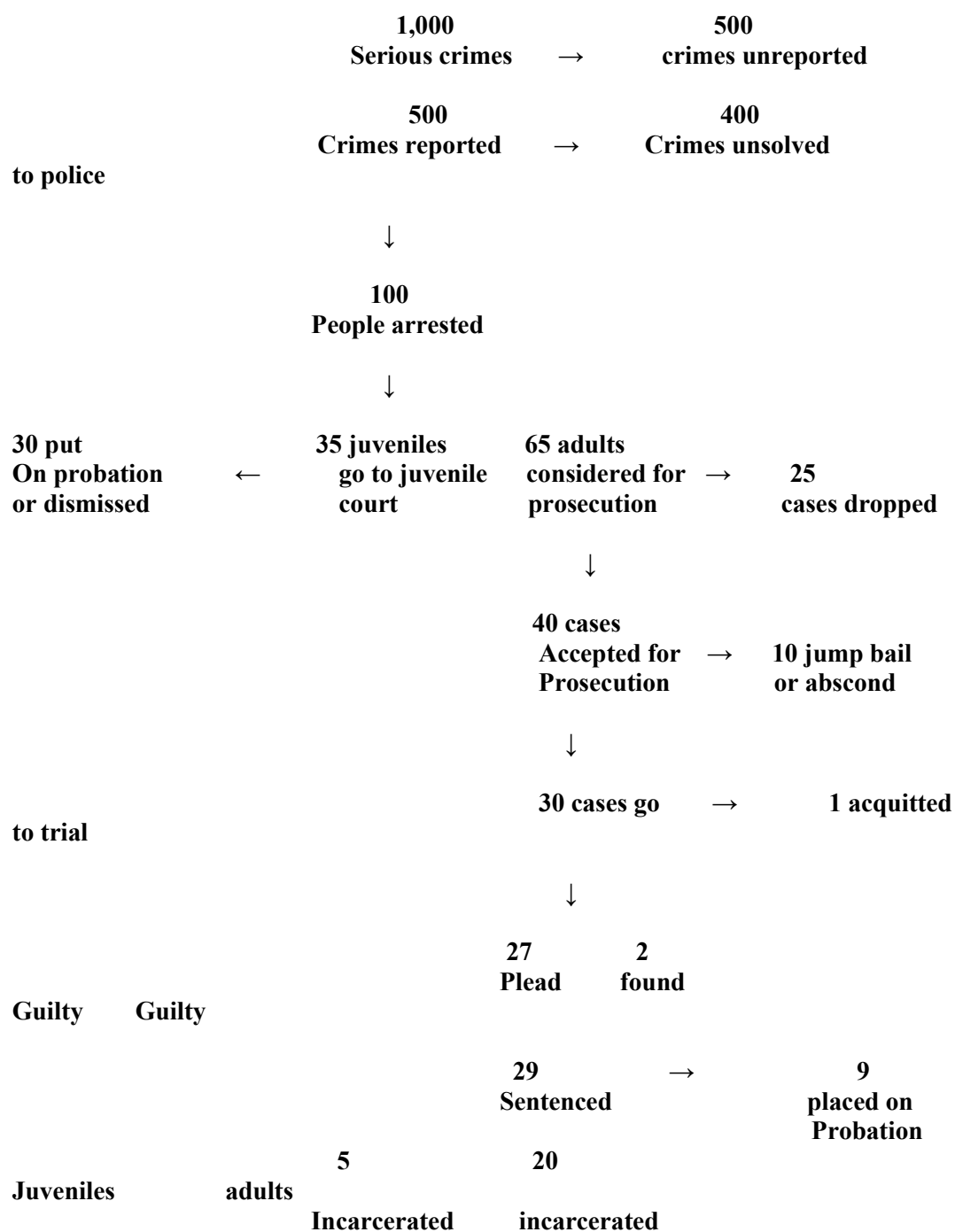
The criminal justice system can be viewed as a process in which an individual encounters a series of discretionary points (see table 1). The first step of this process is the arresting officer and proceeds throughout the judicial system ending with an offenders’ reentry into society. This process can take a variety of courses based on the actions of key decision makers through their use of discretion. They decide whether to maintain the offender in the system or to decide to discharge the suspect without action (see figure 2). This process entails police procedures, the prosecutorial stage, and the trial stage.



**Table 1**  
**The Interrelationship of the Criminal Justice System and the Criminal Justice Process**

<b>The system: agencies of crime control</b>	<b>The process</b>
<b>1. Police</b>	<b>1. Contact</b> <b>2. Investigation</b> <b>3. Arrest</b> <b>4. Custody</b>
<b>2. Prosecution and defense</b>	<b>5. Complaint/charging</b> <b>6. Grand jury/preliminary hearing</b> <b>7. Arraignment</b> <b>8. Bail/detention</b> <b>9. Plea negotiations</b>
<b>3. Court</b>	<b>10. Adjudication</b> <b>11. Disposition</b> <b>12. Appeal/post-conviction remedies</b>
<b>4. Corrections</b>	<b>13. Correction</b> <b>14. Release</b> <b>15. Post release</b>

Source: Senna & Seigel 2008: 19.



**Figure 2**  
The Criminal Justice Funnel

Source: Senna & Siegel 2008:18

### ***Police Procedures***

The discretionary process for police officers is important because they are the gatekeepers of the criminal justice process. “Even if they believe a crime has occurred, they may use their discretion to issue a warning, make a formal arrest, or take some other course of action.” (Senna & Siegel, 2008). According to Senna and Siegel (2008) there are four stages of decision making for police officers initial contact, investigation, arrest, and custody.

The initial contact is the step where police action begins. This contact can be initiated while in routine patrol, through an informant's information, on the officer's own initiative, or through a suspect's confession to a crime he has committed. The second stage is the investigation stage that can play out through a number of ways. The time table can range from within minutes, for example, the officer sees the crime being committed and reacts, to a matter of months or years, for example a crime that is under surveillance from other departments—Federal Bureau of Investigation or Drug Enforcement Agency—in the criminal justice system.

The next stage is the arrest stage that entails the officer's decision to take a person into custody and proceeding to hold them for a criminal violation of the law. An arrest usually ensues when the officer witnesses the act, has probable cause, or has an arrest warrant. There are certain conditions that exist to uphold a legal arrest. The officer must have probable cause; the officer deprives the suspect of his freedom, or a loss of liberty of the suspect who believes they are being held without an option by the officer. This is the level where the most discretion can be found from the police officer's standpoint. The officer has the option to slap the suspect on the wrist at this level, take the suspect into custody, or overlook the crime altogether. This is where there can be potential for biases when making this decision through the criminalized white racially framed view (this will be discussed in further detail later in the chapter) of the black man can be an issue. From this stage, the officer makes the decision of whether to append the suspect into custody.

The last stage of the discretionary process for the officer is custody. At this stage, the police officer has made the decision to detain the suspect. The police then have the

option to interrogate, search, and bring in personal witnesses against the suspect. Once the decision has been made by the arresting officer and his superiors that sufficient evidence is found to charge the individual with a criminal. The next step in this criminal justice process is to pass the case to the prosecuting attorney.

### ***Prosecuting Attorney Stage***

Once the case has found its way to the desk of the prosecuting attorney's office they have the discretionary power to decide to bring charges, how to proceed with the case, decide if a deal will be negotiated, or if the case should be brought up to trial. The stages of the prosecutorial process according to Senna and Siegel have five stages charging, preliminary hearing/ grand jury, arraignment, bail/detention, and plea-bargaining. The prosecutor has the option to decide the fate of the defendant through all of the stages in their decision making process making their decision the most powerful. When viewing through the white framing model, the most detrimental.

The charging stage involves the leeway for the attorney's bias and own specific interests to become a factor in their decision-making. The attorney has both minor and serious crimes in this process. Minor (misdemeanors) crimes are generally handled through a motion filed before the court to try the case. Serious crimes (felonies) depending on procedures allow the attorney to make the decision to either bring the case to the grand jury or conduct a preliminary hearing. These factors are a part of the decision of the prosecuting attorney on whether to charge a suspect. These factors are discretionary based which include case pressure, political issues, or a decision based on the prosecutors individual bias or personal interests. In this step, thinking from the white racial frame can be critical to the decision to try the defendant with a crime. In this process, the prosecutor can decide the case warrants no further action and take an action of nolle prosequi (the decision by a prosecutor to drop a case after a complaint has been made because of, for example, insufficient evidence, witness reluctant to testify, police error, or office policy.) (Senna & Siegel, 2008).

The preliminary hearing/ grand jury stage is the stage where the prosecutor must present their evidence before a grand jury to make a decision regarding the presence of

sufficient evidence to take the case to trial. This is the stage in the system that requires the government to prove there is probable cause to charge the defendant with the specific crime. At this stage, the prosecutors discretionary bias and own interest can play a major role as well. The prosecutor has the option to defend a number of options of crimes that they have probable cause to charge the defendant. The problem at this stage when thinking of the attorneys views through the white framing model they can decide to charge white defendants with crimes that carry a lesser sentence versus choosing to charge a black defendant with a crime that carries harsher consequences.

The arraignment stage the defendant is brought before the court and read their formal charges, informed of his rights, has a date for trial set, enters his plea, and any bail options are discussed. The prosecutor at this stage can chose to exercise his right to request a bail that he is aware the defendant is not able to afford based on his level of bias. The bail/detention stage allows the defendant to be released to prepare their case. People who cannot gather up the sufficient funds find themselves residing in the county jail or house of corrections until their trial begins.

The plea bargaining stage consists of a meeting between the defense attorney and the prosecutor. This is a critical stage for the prosecutor. They provide a level of leniency if the defendants will plea the case outside of court. This process is frequently criminalized. The movie *American Violet* depicts the case of a Hearne Texas drug bust. The case of Erma Faye Stewart, 30-year-old single mother of two, and Regina Kelly, 24-year-old single mother of four, on November 2, 2000 is an example of a plea bargaining tragedy. The defendants being poor (all residents of a housing authority), black (all but one were African American), and underrepresented (provided public defenders) in the drug bust case in Hearne Texas. They were accused of being involved in a drug sweep based on the information given to police through an informant who later recanted his story. On the advice of their court appointed attorneys, they were urged to take a plea bargain. This bargain included pleading guilty, probation, and the option to get out of jail. The alternative they were told would be five to 99 years in jail. Stewart after being in jail for a week with no one to care for her children took the plea bargain. Although the

other cases in the drug bust sting were dismissed because of the informant recanting his story, dismissal was no longer an option for Stewart. Due to her guilty plea she was not eligible to have her case dismissed and is still suffering the consequences. This is a very common occurrence when choosing to accept a plea and almost 90 percent of criminal cases are solved through plea-bargaining.

### ***The Judicial/ Trial process***

If the prosecutor decides against negotiating a plea or any form of settlement, the next step that will follow is the criminal trial. This decision by the prosecutor can also be viewed as strength to their use of discretion when deciding from the white framing model whether to continue and take the case to trial. Three steps are taken in this process according to Senna and Siegel. These steps are trial/adjudication, sentencing/disposition, and appeal/post-conviction remedies.

The trial / adjudication stage is when the criminal trial is held. The defendant is tried before either a judge (bench trial) or a jury. At this stage, the prosecutor has the opportunity to present the evidence that must be sufficient beyond a reasonable doubt. There is the possibility the defendant will be charged with the crime. In the event a decision before the court cannot be made, the prosecutor once again obtains the power of discretion. The prosecutor at this stage can decide to retry the defendant later. This level of discretion can also obtain a certain amount of racial bias due to the belief in the criminal black man (this view will be further discussed in this chapter) viewed from a white racial frame of thinking.

The next stage is the sentencing/disposition stage. If the defendant happens to have been found guilty at the trial he must return to the court to be sentenced. This is the stage that there is an amount of discretion left in the hands of the judge. Judicial discretion can be used at this stage to sentence defendants who have been charged with a crime. The sentence given can be vastly different even though the same crime has been committed. This is where there is a possible stage for the judges' bias (in cases where there are not mandatory sentencing guidelines to be discussed in chapter III). The judges when

viewing things through the white framing model can decide to give a more lenient sentence for a white defendant versus a harsher sentence for blacks.

The next step is the appeal/post-conviction remedies. At this stage, the defense attorney has the option to ask the trial judge to look into the decision of guilt made by the jury. The judge has the option to view the evidence and call the jury's verdict a mistake. If the defendants' constitutional rights were violated, the appellate court has the option to rule whether the appeal has merit. A detailed description of the formal criminal justice process has been given. It is now time to examine the importance of these social actors. The question at hand is why are these positions in the criminal justice process important to discuss?

### **Why Examine Important Justice System Actors**

Systemic racism is an epidemic killer of not only people, but also many important human values, scores of excellent ideas, and countless innovations and inventions. This chapter will provide a theoretical approach towards understanding a focus on the impact of the role systemic racism plays in the criminal justice system. In practice, the criminal justice system provides differential treatment for African American people versus their white counterparts through discrimination. When considering the inequality in the criminal justice system there is a question of where the ball of justice is being dropped. Current Criminology statistics finds African Americans are more likely than whites to experience discrimination when being arrested are. Seventy percent of African Americans have reported an experience of a discriminatory nature compared to 36% reported by their white counterparts in their lifetimes (Kaufman et.al, 2008). These discriminatory acts are often experienced through interaction with law enforcement agencies that are in place to provide social order. African-Americans are victimized at a rate 37.3% higher for violent crimes than whites ( The bureau of justice statistics, 2008). The difference in discretionary decisions is important. This is essential when viewing statistical evidence on differences in the use of discretion based on crimes for blacks versus whites. One of the widely cited studies conducted by the *San Jose Mercury News* matched over 700,000 criminal cases by crime and history of the criminal defendant.

This study found “similarly situated whites were far more successful than African Americans and Latinos in the plea bargaining process; in fact, at virtually every stage of pretrial negotiation, whites were more successful than non-whites.” (Kaufman et.al, 2008).

This is an introduction to the leading discretionary problem. There are also inequalities in the amounts of discretion used on the levels of prosecuting attorneys and judges that are absent in the current literature. My research will indict all three levels (judges, prosecuting attorneys, and police officers) of white social actors that are behind discretionary decisions. The absence of discussing the history and culture between the interaction of blacks and white social actors’ role in making these decisions is a key missing factor in current research today. There are powerful forces in the history and culture of race relations that have influenced the interaction between people of color historically and directly through the criminal justice system today. “The first is a psychology of race relations characterized by stereotypes of black criminals, by unconscious preferences for whiteness over blackness, and by a resulting lack of empathy among whites for black offenders and their families. The second, which shaped the first, is a three-century-old pattern of economic, political, and social dominance of blacks by whites” these are assertions by Tonry. These powerful forces as described by Tonry are essential to understanding the inequality in the criminal justice system however; they do not approach the central actors in the structuring of these stereotypes, people who shape the system, the creators of the code words that are used, and the discretionary power they possess. My project provides the missing foundational piece to the inequality black men experience in the criminal justice system by pointing out the key actors (powerful elite white men) who are implementing these policies. I am suggesting we “examine the actors.” This study will combine theoretical aspects — systemic racism, white racial frame, Eurocentric law, and interest convergence— as a created theory of the white framing model. This study will provide an explanation on a psychological level, from the white mind perspective, through examining beyond the



statistical findings in criminology and examining the core of “why” the problem of inequality through discretionary decisions exists.

The social actors (judges, prosecuting attorneys, and police officers) make decisions that affect the outcome of who is ultimately a part of the criminal justice system. This is why it is important to know the frame of mind (manner of thinking) of these white social actors. In the case of *Terry v. Ohio*, the Supreme Court gave the right for police officers to conduct a limited search when they suspected dangerous or criminal activity. This became known as the stop and frisk rule. This allowed police officers the discretionary ability to constitutionally stop, question, and frisk someone even with the absence of probable cause. This allowance will prove to make stops and searches of African Americans a commonplace occurrence. This type of power leaves the decisions of who is a part of the criminal justice system in the hands of powerful social actors and, allows them the ability to react on impulse. These impulses are driven theoretically and historically from the belief that whites are superior and blacks are criminal. These discretionary decisions can have a direct effect on inequality and mass incarceration in the criminal justice system.

Thus far, we have discussed who the social actors are, why we should examine them, and the level of the criminal justice process that allows them to use discretion. Throughout this process, there remains the need to take a theoretical perspective glance into the minds of these critical decision makers. The following theoretical perspectives will provide a connection between the inequalities in the criminal justice system by theoretically linking powerful whites minds in making discretionary decisions. The following information provided in this chapter will focus on the racially motivated minds of the decision makers’ by providing a glimpse into systemic racism, the white racial frame, the interest convergence principle, and Eurocentric law which equal a white framing model mindset.

### **Systemic Racism**

The role of systemic racism is to provide insight into the embracing of the neglect for African Americans through actions of these elite white men (ewm). The criminal justice

systems primary role is to regulate and control. It is important to point out here the effect these systemic racist actions can have on marginalized groups (such as blacks).

We have embraced what criminologist Michael Tonry . . . calls a policy of ‘malign neglect,’ and in doing so we, as a society, have stumbled more or less wittingly into a God-awful cul de sac. . . . The connection of this apparatus to the history of racial degradation and subordination in our country (lynching, minstrelsy, segregation, and ghettoization) is virtually self-evident. . . . The racial subtext of our law and order political discourse over the last three decades has been palpable. This pattern reinforces the claim . . . that one major function of the criminal justice system is the regulation and control of marginalized social groups such as African Americans (Tonry, 2010).

One explanation offered in the current literature as reasons the white framed legal system may embody inequality is the systemic racism approach. This can provide a theoretical look into why the system may have discriminatory discretion linked to the white minds, powerful social actors, behind the scenes. Systemic racism encompasses white-racist dimensions. These dimensions are emotions, attitudes, habits, and the institutions controlled by whites in this society. Systemic racism is far more than defined as simply a matter of individual bigotry. Systemic racism is the material, ideological reality, and social aspects in major United States institutions today (Feagin, 2010). Systemic reasons are used to explain why identical factors and dynamics can produce very different outcomes for blacks and whites when interacting in the criminal justice system.

Systemic racism is subject to including a complex array of practices that are anti-black, unjust gaining of economic political power by whites, inequalities in resources along racial lines, and the framing of emotion-laden racism used to rationalize and continue the maintenance of whites’ privilege and power. The upkeep of this maintenance was depicted in the autobiography of Melton McLaurin in his experiences of growing up in the South. Despite the violence, white children committed against black children their parents and police officers did not react to these acts of violence. These acts were taunting, harassing, throwing blocks of granite, and shooting BB guns. They were clear actions of assault however; blacks did not report these actions to the police.

Why you may ask? The reasons are clear and disturbing as well. The police were white and either took the position of being on the side of the white attackers, or winked at their violent actions. This helped to maintain and upkeep white power through support of police officers.

Systemic racism is a broad reproduction process. This process perpetuates and generates racial discrimination patterns that are reoccurring. The racist ideology centering on systemic racism is the attitudes, emotions, habits, actions, and institutions of whites we see in America today (Feagin, 2006). Systemic racism is beyond the average bigotry and prejudice that is visible. It entails social, material, and ideological reality embedded in our major white run institutions today. Systemic racism provides a filling of the link for racial disparities among white minds behind the scenes (judges, prosecuting attorneys, and police officers) in the criminal justice system. The introductory definition of systemic racism has been discussed. It is critical to understand the historical foundation upon which this current systemic institution is grounded.

### ***Historical View***

Theoretically linking racial disparities to the minds of power (whites) through historical existence is important. Historically, racial issues are not new to the United States. They have been present for about 350 years that is equivalent to 90% of our existence. African Americans have been free for only about 10% of this time. The white mindset must be locked into a certain denial of the cruel realities of everyday systemic racism in an attempt to be racial oppressors. Whites felt the need to defend their white privilege and power. This feeling was brought by slaveholders to help them rationalize the slavery institution, while seeking rationalization of slavery. When North American slavery was established in the 1600s, an interpretive perspective was developed that sought to justify the institution of African American slavery. These racist issues can be interpreted through all institutions in a systemic manner. The slavery era is extremely important because this was the time when the founding era (the first American colonies followed by the United States) was constructed materially and socially.

In the mid-1950 to the 1960's there was a sudden rise in movements for civil rights as a call to law and order. Civil rights protestors were labeled with the age-old criminal moniker rather than being depicted as political in nature. The non-violent movement of Martin Luther King Jr. was said to be a leading cause for crime through his civil disobedience philosophy. The then vice president of the United States Richard Nixon asserted the civil rights movements could be credited as the cause for the sudden rise in the crime rates. He felt these movements provided a right for individuals to decide to follow the law or disobey the law and spread a corrosive doctrine. Fast forward to the presidential election of President Nixon, he pursued a racial strategy that the problem of crime was directly related to blacks (Alexander, 2010). He set out to devise a system that emphasized and recognized blacks through his subliminal appeal to white racist to support blacks as the cause of crime. This is the root of the criminal justice system in place today.

The belief in the violence and rise of crime of civil rights movements were worse when the riots in 1964 swept the nation, and worsened by the 1968 assassination of Martin Luther King Jr. These acts support the view of the criminalized black man through their migration from the South and the belief of the civil rights leaders, whom were black, as a cause of a rampant increase in crime. Representative John Bell Williams states, "The exodus of Negroes from the South, and their influx into the great metropolitan centers of other areas of the Nation, has been accompanied by a wave of crime.... What has civil rights accomplished for these areas? ... Segregation is the only answer as most Americans— not the politicians— have realized for hundreds of years." (Alexander, 2010). These movements tie into systemic racism views of whites regarding blacks as criminals and constructing their systems to defend their actions and decision making for blacks being harsher due to their linkage to a rise in crime rates.

"The law and order perspective, first introduced during the civil rights movement by rapid segregationists, had become nearly hegemonic two decades later" (Alexander, 2010). By the 1990's there was a new system of racialized social order. The percentage of blacks arrested for property crimes rose from 29 percent to 33 percent. For violent

offenses, the rates rose from 44 percent to 47 percent between the years of 1976-1992 (Wacquant, 2010). The gap has risen for the differences in arrests for blacks versus their white counterparts. The number according to Wacquant (2000) rose from a one to four ratio in the 1980's to a current difference of one to eight. The sudden rise of these numbers can be related to the increase in discretion used based on decision makers beliefs rooted in systemic racist ways.

The criminal justice system is an institution that operates in a systemic manner and these racial division lines are clear. The continuations of the same historical racial issues in past systems of oppression are still present in our criminal justice system today. Current statistics given in 2008 show, the arrest rate of blacks for drug crimes was 3.5 times higher than that for whites. In 2006, the last year for which national data from state courts are available, 49 percent of defendants in urban courts charged with drug crimes were non-Hispanic blacks and 26 percent were non-Hispanic whites (Tonry, 2011). There is a clear reflection of racial issues. Tonry addresses these issues and although he does not coin these as systemic he is clearly describing a systemic racist institution. Keeping these unequal statistics in mind there is a connection between this inequality and the discretion made by white social actors. These unequal arrest rates for drug crimes show the inequality in drug use in suburban areas going unchecked, underreported, and ignored through the exercise of discretion of white social actors. People of color are concentrated in urban areas and coined as potential drug users and dealers by powerful white social actors holding on to these systemic views. Although there is a serious drug problem in urban, minority communities, the problem also exists in every other community (Tonry, 2011). The white racial groups' interests rose throughout an extensive period.

Now that the readings have provided both historical and current foundational grounds on which racism is based the connection will be made to the role this theory plays in the discretionary decision making process.

### ***Role of Discretionary Decisions***

Stereotypical perspectives born into systemic racism have become an essential part of the way of thinking for dominant whites through the white framing model. This will be useful in providing a glance into how white criminal actors think of the world. In relation to their thoughts of themselves versus the black men, they view as deviant or criminal. Tonry (2010) finds white Americans are influenced by these negative stereotypes of blacks as criminals. This view is supported by colorism research and the research on public opinions and attitudes. This research also shows, overtly racist attitudes have been replaced by racial resentments, which are the single most powerful explanation for why many more whites than blacks support harsh criminal justice policies. Discussion will be provided on the effect of systemic racism and the white racial frame of minds on the belief in emotion-laden stereotypes acted out through the exercise of discretion of white social actors.

Emotion-laden stereotypes of criminality places emphasis on the bestial and apelike appearance, uncivilized, alien, foreign, criminal, dangerous, and rebellious aspects of the black man are the focus. For centuries the emotion-laden stereotypes and images of the black criminality have remained. Adhering to these stereotypes provide white minds the ability to react accordingly in the criminal justice system through discretion. Research conducted by social scientists and others have found whites automatically connect African Americans and crime. This belief is also passed on through public media perspectives. William Bennett, former Secretary of Education, commented on a radio talk show “if you wanted to reduce crime, you could — if that were your sole purpose—you could abort every black baby in this country and your crime rate would go down. “After making this obviously racist remark, he attempted to back track by stating, “An impossibly ridiculous and morally reprehensible thing to do, but your crime rate would go down.” (Feagin, 2010). One must ask themselves was the “impossibly ridiculous and morally reprehensible thing” the killing of babies or his assumption of referring to all black people being criminal. This is a clear example of how embedded the relationship with African Americans and crime are in the minds of whites.

Research conducted by social scientists and others have found whites automatically connect African Americans and crime. The apelike stereotype provides an image of African Americans can be seen by powerful whites (judges, prosecuting attorneys, and police officers) as the link to criminality and the “criminal black man.” One way this belief was perpetuated in the media was through the Bush-Dukakis presidential campaign in 1988 and centered on Willie Horton. Horton was convicted earlier of a particularly gruesome murder in Massachusetts. He was released early under a Massachusetts prison furlough program he absconded. Months later, he broke into a suburban Maryland household. Horton proceeded to assault the man of the house, ties him up, and rapes his fiancé’. A photograph of the bleary-eyed and disheveled Horton, taken shortly after his arrest, became a prominent image in the campaign to represent Dukakis’s softness on crime. Although Lee Atwater, the creator of the Willie Horton strategy, and others later denied that they were playing a race card, subsequent reconstructions make it clear that they were. This picture was used to make a clear indication on the ideas of the criminal black man. This way of viewing black men provide an excuse for discretionary disparities by whites from behind the scenes (police officers, judges, and prosecuting attorneys) in the criminal justice system. The theoretical aspect of this study provides a focus on the white mind. The focus of the white mind is providing a psychological approach by demonstrating the manner in which the white framing model encompasses systemic racism as well as the white racial frame of mind.

### **Dimensions of the White Racial Frame**

One of the characters in the old radio series *The Shadow* was a superhero who could become invisible because he had the power to cloud men’s minds. Racism has a similar power to cloud American minds. Racism prevents many whites from understanding that they are the major beneficiaries of civil rights policies; and many blacks rely on and defend those policies with little appreciation for what motivated their issuance and how vulnerable they are to withdrawal when conditions change. (Bell, 2005).

This way of thinking through the clouded minds of men provides a psychological modifier for the way the minds and views of this white racial frame can be instilled in the minds of society. This view can have a great impact on the discretionary decisions made by white social actors. The dimensions of the frame have provided a vantage point for whites and others to view and interpret society. This frame provides a glance into the theoretical linkage behind the white minds of power (prosecuting attorneys, judges, and police officers). In an all too often case of drug offenses this frame of mind when investigating a case from a prosecutorial discretion point of view can be thoroughly racialized. In an example provided from Michelle Alexander of a former U.S. Attorney's explanation:

*"I had an [assistant U.S. attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, 'Why do you want to drop the gun offense?' and he said, 'He's a rural guy and grew up on a farm. The gun he had with him was a rifle. He's a good ol' boy, and all good ol' boys have rifles, and it's not like he was a gun-toting drug dealer.' But he was a gun-toting drug dealer, exactly." (Alexander, 2010).*

This experience depicts a case of the prosecutor using his discretion to excuse a white defendant because he did not fit the description of the "typical drug dealer" when defining a drug dealer in the context of how he will look from the perspective of the frame, a black man.

According to Feagin, the white racial frame is a vantage point of viewing society by whites and the way in which they interpret society. The dimensions expressed by Feagin of the white racial frame are Racial stereotypes (a verbal=cognitive aspect); Racial narratives and interpretations (integrating cognitive aspect); Racialized emotions (the "feelings" aspect); Racial images (the visual aspect); and Inclinations to discriminatory action. These aspects have created or reformulated the legitimizing frame. This frame in the criminal justice system is the white framing model. This frame demonstrates the perception of whites being superior, full of virtue, and moral goodness. This frame is the only frame dominant whites' perceive, for this frame is not one frame among many." Indeed, it is a worldview that has routinely defined a way of being and acting, a broad



perspective on life, and one that provides the language and interpretations that structure, normalize, and make sense out of much in this society.” (Feagin, 2006). These aspects provided a theoretical association to the white minds behind the scenes (police officers, judges, and prosecuting attorneys) in the criminal justice system and how this way of thinking can affect their use of discretion. The dimensions that are entailed in the white racial frame have been examined. Now a look back into the historical basis from which the white racial frame of mind is created will be provided.

### ***Historical View***

The white racial frame of mind can be theoretically linked to the thinking from behind the scenes of the minds of power (white men). From the first decades, slavery and Jim Crow segregation are responsible for fundamentally shaping our society. This is possible because these frames are legitimized through the racist systems and embedded in many bureaucracies in this country. This term is important to understand, white racial frame of thinking in systemic institutions, to provide a historical grasp on the white framing model of the system. The white racial frame has been a part of society since as early as the seventeenth century. People calling themselves “white” socially constructed the racial hierarchy faced today by all Americans in the late-1600s. They created a hierarchical society centered on slavery and, later, Jim Crow segregation; they also created a white racial frame to interpret and rationalize this oppression (Feagin & Cobas, 2008).

### **Narratives**

This frame is a narrative that positively stereotypes whites and negatively stereotypes other racial groups. A key aspect of white racial framing incorporates concepts of white superiority, in counterpoint to the belief in the inferiority of racialized “others” (in the early period, African Americans and American Indians). Over time, this frame has been elaborated and forced on the minds of Americans through the powerful dominant culture (whites). Elijah Anderson’s empirical approach in *Against the Wall: Poor, Young, Black, and Male* provided a police perspective of the black male as inferior and a criminalized “other.” When Anderson found himself a victim of a crime, car theft, and the officer that

responded to his complaint made the assumption of whom the perpetrators of his car theft were. When he (Anderson) decided to ride with the officer to look for his vehicle the officer drove directly to the projects. When they arrived, Anderson asked the officer “Why he had chosen to come here?” (Anderson, 2008). The officer simply replied “This is where they usually take cars.” (Anderson, 2008). The “they” the officer was referring to were blackmales. Through thinking from this white racial frame of mind, he assumed the perpetrator of the crime was a young black male whom resided in the projects. This narrative view is an important element embodied in the white framing model.

### **Elements**

There are a myriad of elements of the white racial frame. They accent the virtues, privileges, and power which whites possess. According to the belief in the white racial frame, to be white and whiteness are viewed positively by people whom consider themselves white and by people who do not. Anderson (2008) found, the law-abiding black people, particularly middle class, take on this perception of white and whiteness through their styles of self-presentation in public, through their style of dress and bearing. This supports the element of seeing blacks as an “other” in the criminal justice system.

This perspective of the white racial frame is unidirectional. Whites hold their position and wage of whiteness in the position of being virtuous and pure and the racialized “others” as often “not virtuous” and “impure.” This frame of mind has imposed a negative view of the racialized “others” whom are being oppressed and exploited, and a positive orientation towards the importance of whites and whiteness. Such “othered” groups were framed in terms of negative ideas, including the view that they were foreign, uncivilized, and physically ugly. Such “othering” was centered in part on physical appearance, in part on linguistic, and partially other cultural characteristics. According to theorist perceptions of “othering,” the others are perceived as dangerous, inferior, and criminal.

“The practice of targeting racial minorities for routine traffic and pedestrian stops originated with the war on drugs and promoted profiling as an effective policing tactic to

detect drug offenders.” ( Tonry, 1994). This practice of othering is depicted in the criminal justice system through the advent of “Operation Pipeline.” Operation Pipeline was a program to incorporate highway drug interdiction to train law enforcement officials — federal, state, and local officers— on drug trafficking offender identifiers. According to Tillyer, the training offered was based on the race and ethnic views of the driver as an indicator for identifying possible drug traffickers. The report processed by the (DEA) noted the control of large-scale drug trafficking was being initiated, dominated, and manufactured by Jamaicans, Haitians, and blacks (Tillyer, 2008). This perception was based on the notion of the criminalizing minorities as an “other”. All of these minorities listed are from African descent demonstrating the belief in blacks being primarily criminal, inferior, and uncivilized. The view of police being able to make a discretionary decision when choosing to stop an individual comes into play. This belief set has led to the systemic racist institutions in place today. These racist institutions are filled with white judges, prosecuting attorneys, and police officers leading to the importance of looking into the foundation of racial disparities through discretionary decisions. The reasons behind these disparities can theoretically link white minds from behind the scenes (police officers, judges, and prosecuting attorneys) in the criminal justice system as essential to defining a link in the white racial frame of mind and discretionary decisions made today. A connection must now be made to explore the correlation between the mode of thinking from this frame (narratives, elements, historically) and the role this mindset plays when making discretionary decisions.

### ***Role in Discretionary Decisions***

There is a sense of fabricating the color line including steering towards incoming ethnic groups into socially constructed racial categories. These categories range from white to black based on the creation of the white racial frame by European Americans. This artificial hierarchy was based on, white privilege, lighter skin at the top and darker skin at the bottom. This led to white perception of a great-Chain of being. This great chain of being idea has not disappeared in the mindset of the United States. The hierarchical chain orients the beliefs still in place. This chain has whites as a group that

is currently at and will remain on the top. This chain of command provides a general perception of the insecurity and “an incessant need to control, dominate, or be better than others.” (Nunn, 1997).

For centuries, the attitudes pitting everyone to support anti-black feelings are embedded as a part of the well-developed frame. These ways of thinking as created by Europeans can be theoretically linked to the minds of power. This has dominated white society for centuries. As children, most whites are provided visions of privilege intergenerationally. This social inheritance is continuously embedded in society through the generational transmission of an array of racial privileges and resources. These values, views, and societal standards are accepted by children from all backgrounds. This way of thinking provides a background on the reasons these racial disparities in discretionary decisions from the white minds in the criminal justice system exist.

### ***Utilization of the Frame***

When the frame is utilized there is a creation of other frames and subframes. Creation of these frames provides insight into the way of thinking of whites (judges, prosecuting attorneys, and police officers) who remain powerful in our criminal justice system. This frame is strong and once embedded can determine your way of thinking. The white racial frame after being inculcated into the mind of an individual has much more than a lasting effect. The effect over years and decades becomes resistant to forms of change. Adoption of this frame can subject the mind to reject facts if or when the facts do not apply to the frame. In Elaine Brown’s book *The Condemnation of Little B* (2002), Little B was a 13-year-old boy that was charged with the crime of murder. The media painted a picture of him as a child that wanted to be a “tough man” and this desire was the reason he committed the crime. Along with unconfirmed reports, the paper described him as a “thug” who was working to prove his manhood leading to the age-old slavery based belief of the savage and criminalistics view of the black man. The white frame of mind is an exploitive structure that is rooted in racial oppression. With these frames and sub frame ways of thinking, someone must take the fall and this would be minorities. These structural institutions are based on the foundation of the law. There is an

important aspect of understanding the culture of the law that is also based from the white racial frame of thinking and how this affects the basis and white validation for making discretionary decisions.

These discretionary decisions are based from the systemic institutions and the white racial frame founded through law. The foundational white framing of the law is important because insight into the ways in which the law was constructed to fit the frame of whites is essential. This construction contributes to the way in which white people in power see blacks and how they make discretionary decisions that affect blacks negatively. Now a look will be provided into the grounding of law (historically) providing a connection to the origins of the law discovered as systemically based.

### **European /English Common Law in Origin is Systemic**

European culture offers the belief that law is universal. However, we find that law is distinctly a factor of the white mans produced legal tradition. Nunn describes legal tradition as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.” (Nunn, 1997). This legal tradition deals with the way laws are made, the people who administer them, and the way in which these laws are operated. This is the focus of my project to express the ways in which the laws are interpreted and how this interpretation can result in unequal rights for African Americans. The role of law is important through the eyes of the powerful because as Nunn asserts, the law is Eurocentric which makes this system is a product from the construction of law combined from all European origin which effects the making of discretionary decisions.

Nunn describes law as a Eurocentric enterprise meaning it is part of a broader attempt used to promote the interests, values, and beliefs of whites at the expense of all others. This is done through law by ensuring the promotion of European ways of life best described by W.E.B. Dubois as a “wage of whiteness.” The historical view of law as

a Eurocentric enterprise will be discussed to reveal the usually hidden relationship when making discretionary decisions between white Supremecy and law (Nunn, 1997).

### ***Historical View of the Law***

Kenneth Nunn asserts, “European Man can do what he wants with his law. Within his world, there is no higher authority than that of the law, which is his own creation. With the creation of the law, the European male has become a self-policing entity-one that need answer to no other.” This assertion made by Nunn was to describe the distancing of man from the creator and providing them the option of looking out for their own self-interest. Nunn is correct in this assertion however, he does not relate this claim to systemic racism. Systemic racism can be used to translate this assertion as relevant to the creation of the laws that are unequal and constructed by white males(through discretionary decision making power) since the beginning of time and created to function in the best interest of the white man at the expense of others, minorities, also known as interest convergence.

The approach taken by Nunn when he states the criminal justice system is a systemic racist system that is in place to ensure white institutions remain. This law is upheld through the white racially framed discretionary decisions made by powerful whites in this system. He argues the law organizes and directs the white culture and institutions that are in place. Operating as a determinate for the ideas and practices that embody white culture through coercion and force, and this law is a means of legitimizing white institutions and holding on to white dominance. These views by Nunn are relevant and synonymous to systemic racist views. When discretionary decisions are handed down these are the institutions of the law that back these unethical circumstances.

### ***Systemic Racism in Connection to the Law***

According to the research findings of these accounts, racial oppression incorporates many heavy burdens coercively placed on subordinated(minorities) people. These burdens include but are not limited to legal enforcement of relegation resulting in a constant necessity to strategize in order to survive. The historical view of systemic racism provides a foundation for how racial disparities can be theoretically linked to the

minds of power (whites) through historical existence. According to Kenneth Nunn, People of color recognize racism through the understanding of being a European aberration which has wrecked havoc on most cultures.

His views for defining his theory of “Eurocentricity” or “Eurocentrism” in relation to law describes this as a tool which consists of prejudice and bias. This prejudice and bias is felt when discretionary decisions are made against blacks. This form of eurocentrism to describe the law defines the human practices, laws, and history of the laws we have currently in place are viewed from a “European perspective, as if Europe was the point of origin or reference for all human affairs.” (Nunn, 1997). This view of the history of law is similar to the theoretical findings through the systemic racism perspective my project is discussing(as a new addition to the discipline) in connection to the way in which discretionary decisions of whites in power adversely affect blacks and has been previously ignored in prior research. The fundamental foundation of the systemically based law was just reviewed. A look into the final theoretical component through which these discretionary decisions are implemented from a white framing model is next. This will lead us to the function of how these actions are beneficial to the white social actors who are enforcing them.

### **Interest Convergence**

During the past six years, the damage to our foreign relations attributable to race discrimination has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. (Bell, 2005)

This is a quote from the Secretary of State Dean Acheson. Due to the constant embarrassment received by other foreign countries, the United States Government saw discrimination as jeopardizing their view and some action needing to follow. This statement expresses the need for whites to show a united front with minorities to foreign lands for protection. This is where interest convergence becomes relevant in the discretionary decision making process. Interest convergence stresses racial equality and

equity for people of color will be pursued and advanced when they converge with the needs, expectations, and ideologies of whites (Bell, 2008). The rights of African Americans, or people of color, are recognized and protected when and only as long as whites perceive that such advances will further the interest of whites, which is their primary concern (Bell, 2008).

Derrick Bell's interest convergence focuses on the progression of Blacks, or people of color, will only occur when it benefits whites. Inherent in the interest-convergent principle are matters of loss and gain; typically, someone or some group, often the dominant group, has to negotiate and give up something in order for interests to converge or align (Bell, 2008). "It is the definitive example that the interest of blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of whites." (Bell, 2005). Both Congress and the Executive Branch refuses to alter the federal sentencing guidelines that have resulted in large disparities in the sentences handed out to black people compared to their white counterparts whom are convicted in drug cases. This lack of cooperation is because this decision will not benefit whites on any level.

The largest disparity in these political developments occurs under the federal law. A "tough on crime" federal law that requires harsher prison terms for people arrested with crack cocaine than with the powdered version of the drug is scientifically indefensible and hugely unfair" as stated in an editorial of the New York Times. This disparity is for every 1 gram (size of a sugar packet) the sentence is equivalent 100 grams of powder cocaine. Particularly purveyors of powder cocaine, a drug used primarily in white upper to middle class communities, have a far less severe penalty than crack cocaine, a drug used primarily in lower class African American and Hispanic communities. McDonald and Carlson (1993) suggests, the average amount of prison sentencing time served by African Americans is 40% longer than the time served by their white counterparts. Tonry found, the racial disparities that carried differential punishment also leads to racial disparities in incarceration.



These tough on crime laws have transferred enormous amounts of power from judges to prosecutors and police allowing them to use persuasion and discretion. Through the advent of tougher sentencing laws for crack, a drug used primarily in the black community, prosecutors use this as a way to express their discretion through plea-bargaining. According to Michelle Alexander, prosecutors have admitted to routinely charging someone with an offense that carries a mandatory long sentencing to force people to admit and plea bargain instead of going to trial. Whites noted, “The value of a mandatory sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more lenient sanctioned charge.” (Alexander, 2010). This mandatory sentencing was a ploy of whites to encourage blacks to snitch on one another even when the person they are snitching on is innocent. The police are allowed to use their discretion to conduct fishing expeditions for drugs based on tips from informants (as discussed in the Hearne Texas drug sting) that are not reliable. These informants usually result in people snitching due to the fear of mandatory sentencing that was set up by whites to ensure the increase of mass incarceration for blacks. The only people suffering from this change are blacks making this issue of no interest for change to whites. A push was eventually made by President Obama.

The current legislation of the fair sentencing act of 2010 has provided some form of change to the unfair sentencing for drug offenses. The signing of this law by President Obama in August of 2010 is a result of 20 years of advocacy. This law raises the amount in the quantity of disparity from 100 to one to 18 to one. This law finds there is a drawing of the legal distinction between crack and powder cocaine, which produces a higher volume of arrests and prosecutions of African Americans. Under federal law, the quantity of cocaine, found predominately in the white communities, necessary to draw a five-year sentence is one one-hundredth for crack as that for powder cocaine—five versus 500 grams. The same quantity of crack possession, drug predominately found in the African American community, sentences are substantially longer than powder

cocaine sentences (Goode, 2002). This leniency can be shown through the example of the war on drugs that will be discussed in later chapters.

This view of interest convergence can be tied into the aspect of the discretionary decisions being made by powerful social actors in the criminal justice system. When the interests of the whites are served in the decisions, being made there is a form of leniency that is provided to whites that is not so generously given to blacks. Whites' interests are being met through these unequal laws. This supports the lack of change being pushed by whites because their ultimate goal is being obtained, the mass incarceration of blacks. This chapter provided a well-rounded view from a theoretically linked perspective — systemic racism, white racial frame, Eurocentric law, and interest convergence— to the perspective from which discretionary decisions are made. The combination of these theories results in a new theoretical frame of making discretionary decisions by white social actors, the white framing model.

### **Conclusion**

This chapter discussed the statistical makeup of representations of social actors (judges, prosecuting attorneys, and police officers). These statistics showed whites are dominant and key actors in these positions providing a white frame of mind to influence all three (judges, prosecuting attorneys, police officers) discretionary decision making positions. The importance of discussing the frame of mind (manner of thinking) of these white social actors was discussed. The significance found in this chapter focused on the role of the social actors (police officers, prosecuting attorneys, and judges) being key deciders in discretionary decisions and these decisions that affect the outcome of what group of people will ultimately become part of the criminal justice system. In this case, the marginalized group in question is African Americans.

The systems in place were described through the terms of systemic racism. Through viewing the system in a systemic fashion, this chapter provides a theoretical look into why the criminal system may have discriminatory discretion linked to the white minds, powerful social actors, behind the scenes. Through a historical perspective of systemic racial issues were discussed as an old phenomenon. Racial issues were discussed as

being a part of society for many years equivalent to the majority our existence. African Americans were free for a small percentage of this time. The constant view through the historical systemic racism approach was discussed. This view provided a contribution to the way white people in power see blacks and how they make discretionary decisions that affect blacks negatively. A connection to the historical way of thinking was provided through a glimpse into emotion-laden stereotypes and narratives of criminality as an example. This way of viewing black men provided an excuse for racial disparities by whites from behind the scenes (judges, prosecuting attorneys, and police officers) in the criminal justice system when making discretionary decisions. These decisions were discussed as being made through a white framing model. In order to be racial oppressors the white minds must find themselves locked into a certain denial of the evil realities of everyday systemic racism. These realities have a direct association to the white framing model.

The white racial frame provided a vantage point for whites and others to view and interpret society. This frame was discussed as providing a glance into the theoretical linkage behind the white minds of power (prosecuting attorneys, judges, and police officers). This linkage was argued as important to indict the racist institutions filled with white judges, prosecuting attorneys, and police officers. This linkage provides a foundational piece to the puzzle regarding racial disparities through discretionary decisions. The reasons behind these disparities and theoretically linking white minds from behind the scenes (police officers, judges, and prosecuting attorneys) in the criminal justice system helped to define a link in the views from a white framing model and discretionary decisions made today.

The discussion of these institutions as essential lead to the need to provide a historical view of the law as Eurocentric that consistently effects white social actors' mindset. The view of the law as Eurocentric and built from a white racist framing perspective provided an explanation of the white mind perspective on a psychological level. This view of the law goes beyond the statistical findings in criminology and examines the core of "why" the problem of inequality through discretionary decisions

exists. This chapter discussed how making discretionary decisions for powerful social actors today, as in the past, have anti-black attitudes embedded in the European American culture as a part of the well-developed frame. A view was provided on the important aspect of understanding the culture of the law based from the white racial frame of thinking. The affect this has on white validation for making discretionary decisions. This view of the Eurocentric law provided a glance of the view from the European man's (judges, prosecuting attorneys, and police officers) perspective. Within his world, the white man saw no higher authority than that of the law, which is his own creation. This creation was provided to demonstrate the view that the European male has become a self-policing entity that needs answer to no other. Supporting discretionary decisions being made from a white framing model perspective.

This view of the law leads to the discussion of interest convergence. This view stressed the racial equality for people of color will only be pursued and advanced when whites' needs, interests, and white ideology converge. This glance into the white minds through the lack of positive incentive to make equal discretionary decisions provided an aspect to the white framing model. This chapter provided a well-rounded view from a theoretically linked perspective — systemic racism, white racial frame, Eurocentric law, and interest convergence— to the thinking of white social actors from a white framing model. The effect of these theories on the basis and white validation when making discretionary decisions was a much needed addition.

The following chapter will discuss the role of discretionary power and the ways in which it lies in the hands in detailed form for each individual position of these white powerful social actors.

### **CHAPTER III**

#### **INTRODUCTION TO DISCRETION**

Discretion is a hallmark of the criminal justice system, and officials at almost every stage of the process exercise discretion in the performance of their duties and responsibilities (Davis, 2007). This chapter will focus on discretion and its' use in the hands and authority of powerful white social actors in the criminal justice system process. The definition of discretion will be provided. Discretion will be defined as a necessary power needed to make the justice system work. There will be a glance into the possibility of injustice and discriminatory results through the misuse of discretion.

The first level of the discretionary decision making process will be described as police discretion. Discretion will be discussed as part of the daily lives and position of police officer. There will be examples provided to explain the possibility of discretion used from police officers when thinking from a white framing model. The outcome of these discriminatory acts will be discussed as detrimental to black men particularly when walking (stop and frisk), being racially profiled, driving, and through the incorporation of swat teams with the advent of the war on drugs. Statistical discrimination and racial disparities will be discussed as resulting from discriminatory discretion through the actions of police working from the white racial frame with the consequence of differential treatment (blacks disproportionately represented) in arrests.

The second level of discretion will be discussed through the discretionary power of the prosecutor. The position of the prosecutor will be discussed as a critical role in the criminal justice process. The harmless error rule will be talked about as support for the possible misconduct of the prosecutor through forms of systemic racist laws, such as the harmless error rule, that are in place. The discretionary decisions being made through the white framing model by the prosecutors will be discussed. There will be a discussion provided regarding the four factors— system factors, case factors, disposition factors, and political factors— that are a part of the white racially framed mode of thinking of the prosecutor. Lastly, an example will be provided regarding the Presidential pardon at prosecutors and judges' discretion.

The third level of discretionary power is the power of the judges when making discretionary decisions through the white framing model. Discretionary decisions will be discussed through the power of instructions to the jurors at a jury trial, and the position the judge takes at a bench trial. Another discretionary decision discussed is the power of the judge in sentencing models. Some of these models consist of indeterminate sentencing, determinate sentences, structured sentences, and mandatory sentence. These forms of sentencing will be discussed as a way for judges to make discretionary sentences that lead to the mass incarceration of black men when sentencing through the white racial frame (criminal black man) from a systemic system(emotion-laden stereotypes and narratives as discussed in chapter II). This chapter will demonstrate the powerful position each of these critical white actors play in making discriminatory decisions that lead to mass incarceration ( leading to further discussion in the following chapter) of black men at a disproportionate rate.

### **What is Discretion**

Discretion is a necessary process and evil due to maintenance patterns of the system. This indicates the importance of maintaining discretion in the criminal justice system. Research suggests the lack of discretionary power can have critical results. “ A system without discretion which limits police, judges, and prosecutors to take into account the individual facts, circumstances, and characteristics of each case, would undoubtedly produce unjust results” (Davis 2007). Although these findings describe the importance and necessity of discretion they fail to look into important factors and circumstances that can result in a misuse of this discretion. This misuse is demonstrated through the avenue of the white powerful social actors’ ability to make these discretionary decisions.

These decisions can be defined as unjust and discriminatory. These unjust responses are a result of thinking through the white framing model. Davis finds the characterization of discretion leans towards the notions of a “black hole” in the language when studying processes of the criminal justice system. He also noted that the initial understanding is “exercise of wisdom” or “managerial authority,” additional meanings remain from modern usage as “personal input into “decision making” and the “exercise

of power.” When looking at these descriptions of discretion there is a clear view how thinking through a white racial frame can result in inequality for blacks due to their lack of power in a systemic institution (criminal justice system) that deems them powerless.

This system allows discretionary power for police officers, prosecutors, and judges who are key actors in the criminal justice system. Their view and actions of making these decisions from a mindset that views whites as superior and blacks as inferior (white racial frame) is important for this study to fill the major gap in the literature indicting the white social actors. The first discretionary power that will be discussed will be the white dominated position of the police officer.

### **Police Discretion**

Discretion can involve the selective enforcement of the law, as when vice-squad plainclothes officer decides not to take action against a tavern that is serving drinks afterhours. Patrol officers use discretion when they decide to arrest one suspect for disorderly conduct but escort another home. Because police have the ability to deprive people of their liberty, arrest them, take them away in handcuffs, and even use deadly force to subdue them, their use of discretion is a vital concern. (Senna & Siegel, 2008).

Personal discretion is a critical aspect for a police officer they must carry out daily. The above quote expresses some of the critical power and possibility for error that plays a part in discretionary decisions made by police officers in their daily jobs. A key component needs to be addressed. When these discretionary decisions are being made how officers decide which suspects are provided the option to go home versus which suspects they choose to arrest. A theoretical aspect to making discretionary decisions through the white framing model can shed light to the how and why these daily discretionary decisions are made as well as who finds themselves negatively affected.

When considering unjust results made through discretionary decisions of the criminal justice system there is a question of what is the first step to dropping the ball of justice. Research has found in the chain of command the first step lays in the hands and at the discretion of the arresting officer. The arresting officer has four stages where they have the ability to exercise discretion. These steps are initial contact, investigation,

arrest, and custody (discussed in detail in chapter II). The power to determine whether to arrest a possible suspect at the scene of the crime is essential in the outcome for the suspect in the criminal justice process. When dealing with discretion there is an implication that discretion refers to the observed behavior of police and its variability, or to the measured influence of extra-legal factors on such behavior. (Nickels, 2007).

Police officers discretion came into question in February of 1999 in the case of Amadou Diallo, an African immigrant, who was gunned down by the police. A team was formed of white police officers known as the elite street crime unit. Three white police officers proceeded to follow Mr. Diallo to his apartment because they viewed him as suspicious. Once the officers ordered him to stop he took a few steps into his apartment to retrieve his wallet, it is suspected he wanted to retrieve his identification, instead the officers assumed he had a gun and made the discretionary decision to fire forty-one times. This led to acts of the protests by civilians and a series of studies conducted by the attorney general of New York. Instead of reprimanding the actions of the officers, the NYPD made the decision to increase the amount of stops of pedestrians and frisking blacks at grossly disproportionate rates. In February of 2007, the rates for NYPD stops according to released statistics, officers stopped 508,540 people at an average of 1,393 per day. These stops included degrading tactics such as making the suspects lay down on the pavement, spread against a wall, and being groped all over their bodies while bystanders and passersby were allowed to watch. In these stops, the vast majority were minorities with more than half of these individuals being African Americans. This represents not only the power of police to use their discretion, but also the lack of repercussions they face when making these decisions through the white framing model which depicts the black man as a criminal.

The discretionary aspect of police officers is viewed in the system as low-visibility decision making (Siegel & Senna, 2008). This terminology is used because it represents the lack of regulation police officers are subjected to having. Unlike other offices in the criminal justice system, they are not subject to judicial review or administrative scrutiny. Senna & Siegel suggest the lack of disciplinary action can lead police actions to



deteriorate into violence, discrimination, and abusive actions. It is essential to discuss the numerous factors that influence police discretion.

### ***Police Influences***

There are a number of factors that influence and guide discretionary actions used by police officers. These influences are the rule of law, their involvement in SWAT teams, stop-and-frisk rights, driving discretion, racial profiling, and racial disparities. These influences are guided through the white framing model that lead to (negative) consequences for blacks due to the types of discretionary actions taken by police officers. These consequences are visible in the inequality of arrest rates and statistical discrimination. The first influence discussed will be the rule of law.

### ***Rule of Law***

The objective of this rule is to construct a system containing objective and accessible commands. Professor Jerry Mashaw provides a details definition:

A consistent strain of our constitutional politics asserts that legitimacy flows from “the rule of law.” By that is meant a system of objective and accessible commands, law that can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.(Forde- Mazrui, 2007).

The above quote describes the notion of the “rule of law.” This law is to diffuse preferences and discretion used by people in positions of power on an individual basis, and to provide a collective agreement on a system of accessible and objective commands. There are specific rules put into exercise as a means of reinforcing this “rule of law.” There is a doctrine constitutionalized through the courts defined as the void-for-vagueness doctrine. This has stirred up a debate regarding how specific rules reduce discretion. Skeptics of the void-for-vagueness doctrine contend the limits of this doctrine on police discretion are excessive (Forde-Mazrui, 2007). The supporters of this doctrine use the defense of the void-for-vagueness doctrine’s ability to limit the amounts of discretion used by police officers in a beneficial manner. This doctrine will minimize

risks of discriminatory law enforcement against the poor, racial minorities, and other politically marginalized groups (Forde-Mazrui, 2007). This rule if put into place would possibly influence police discretion in a negative way due to the lawmakers thinking from the white racial frame of mind.

The next influential aspect to influence police discretion is the invention of SWAT teams. These teams provide the war component to police forces. They primarily focus on drug raids originated from the “war on drugs” (to be discussed in detail in the chapter IV) campaign. The creation of the SWAT team allows police to make discretionary decisions in the same fashion and with the same equipment provided for military warfare. Now we will examine the influence SWAT teams have on police officers’ discretionary decision making.

### ***SWAT Teams***

SWAT teams were originated in the 1960’s. They became common, although rarely used, in the 70’s. By the 80’s they were a common factor in the criminal justice system. SWAT teams were originally created for use in hostage situations, hijackings, and prison escapes (Alexander, 2010). Today their most common use is by police officers to serve warrants for drug offenses. A report published in the Miami Herald in 2002 supports this finding. “Police say they want [SWAT teams] in case of a hostage situation or a Columbine-type incident, but in practice the teams are used mainly to serve search warrants on suspected drug dealers. Some of these searches have yielded as little as a few grams of cocaine or marijuana.” The use of SWAT teams has become a part of police discretionary power to react in racially motivated and white racially framed moves in urban communities.

There was a transformation in styles of policing which began around 1981. President Reagan took the initiative to persuade congress to pass a military cooperation with law enforcement act. This act encouraged access to military bases, intelligence, and weaponry for police officers at the state, local, and federal level. This marks the transition from “community policing” to “military policing.” Providing police officers’

the right to use their discretion to obtain Swat teams that concentrated on the use and distribution of illegal drugs.

Police officers used these incentives to project and react on their views of discretion through their beliefs in the white framing model. The views they are reacting from are the views of the animalistic and criminal inherent nature of blacks. Making the “war” on drugs a transformation to the “war” on black men. The amount of drug arrests by Swat teams in urban housing projects skyrocketed, drug interaction units were comprised on highways (similar to Operation Pipeline discussed in chapter II), and stop and frisk programs were set to run loose on the streets (see *Terry vs. Ohio* chapter II). A look into the influential factor of stop- and- frisk will now be provided.

### ***Stop-and Frisk***

The findings in the *Terry v. Ohio* case (discussed briefly in chapter II) allowed police officers a considerable amount of discretionary power. This case stands for the proposition that a person can be stopped by police so long as the police feel they have probable cause even in the absence of a search warrant that is a constitutional right. The fourth amendment speaks directly to the right of the police in this unconstitutional act of stopping and frisking. The fourth amendment [1791] states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Despite the cited account of the fourth amendment, the police have found a loophole through the courts to go around this amendment.

In the *Florida v. Bostick* case, the loophole for the lack of police needing probable cause was tested. Bostick was involved in one of many bus sweeps that happened in a span of time (due to the war on drugs that allowed a massive amount of searches by police) despite the low amount of hits. He was frisked and was at risk of being charged with drug possession even though his fourth amendment was violated. Bostick was not a suspicious person unless an officer is viewing things from a white racial frame of mind.

He was a black man, which delegates a badge of a suspicious criminal when making discretionary decisions through a white framing model.

This view of the suspicious black man is also visible through accounts of driving while black. These accounts have a tremendous effect on the amounts of discretion used by police officers. Detailed accounts of driving while black will now be reviewed.

### ***Driving While Black***

Research conducted by Goode (2002) finds, the charge of African American men being targets of arrests for drug charges comes down to one assumption. This assumption can mean many things, of course, but one of its possible meanings is that African Americans are targeted for arrest specifically because they are black (Goode, 2002). When police officers are looking from a white racial frame of mind, all blacks are found to be suspects. This view provides a power to police that is known to be detrimental to African American men. As discussed in chapter II, their discretionary ability allows them (police officers) to react. These reactions to stop, question, and frisk an African American man while driving even with the absence of probable cause is possible. This allowance will prove to make stops and searches of African Americans a commonplace occurrence.

A challenge raised through research conducted by Bowser (2007) showed, black youth of all classes are racially profiled by police. In the event police are going to pull over a black man, they must be aware of their place according to the assumptions of police. Black parents must teach their youth the proper protocol when they are stopped by law enforcement for “Driving while black” or “Walking while black.” This protocol includes not arguing with the police officer no matter how disrespectful he is being to you, do not make any sudden or quick moves, and keeping their hands visible at all times. Black parents know their children — because they are black — could be shot to death, beaten, and arrested if he or she violates any of these rules (Bowser 2007). Incorporated in the findings of driving while black are aspects of racial profiling. Racial profiling has different aspects in connection to police discretionary decisions. A view

into the aspects incorporated from racial profiling (racial disparities, arrest rates, and statistical discrimination) will now be discussed.

### ***Racial Profiling***

It is not surprising that the racial profiling literature documents excessive and poorly justified stops of black people. Two decades of research document that the media commonly portray a world of black offenders and white victims. When asked to describe typical violent criminals and drug dealers, white Americans describe black offenders. This view is synonymous of the views that are portrayed through the white framing model. When police officers make discretionary decisions, their ability of racially profiling black men through their linkage to the white racial frame becomes common.

Tonry (2010) also points the finger at the media who do play an important role at ensuring the negative stereotypes remain relevant in mainstream thinking. White officers commonly use the O.J. Simpson trial (which was widely covered through media outlets) as their point of reference for the negative view of black men. In the book *black in blue* Bolton and Feagin found many of the officers interviewed discussed the impact the medias construction and perpetuating of the negative black man as criminals has on society. In one officers summary they found his view on the negative impact of the media experience as:

*“See a car, three white males ride by. We don’t think nothing of it. See three black males ride by, you got to look a little harder. Sure, I think that you bring that with you because you look at TV. Everything’s telling you they’re racial-ethnically bad, so of course you look harder you know. When I know any of them could be bad. It doesn’t matter. But the perception is, you know you see three of them in a car, they look like a gang.” (Bolton & Feagin, 2004 ).*

This media view given by the officer supports the impact the media has on the negative stereotyping of blacks. Police officers are privy to this information as noted by the officer when he stated “he knows any of them (black or whites in the car) could be bad.” Although he has that knowledge he still proceeds to make the discretionary decision to look closer and potentially stop the car with the black men due to everything

(particularly the media) telling him that black men are bad. The views discussed are supportive to the belief by Tonry that the media plays a major role in the officers' perception of the black man and from what frame of mind these discretionary decisions are made. This aspect of racial profiling also entails an association with decisions of police officers to make calls resulting in racial disparities.

### **Racial Disparities**

The question is why the effects of racial resentments persist and make many whites unsympathetic to the experiences of blacks in the criminal justice system. The most likely explanation for adoption of disparity-causing policies, and their continuation long after their effects became known, and why racial resentments have such blinding power, is the subtlest and hardest to grasp. Tonry (2011) states, "It is that we white Americans as a class are so accustomed to seeing the world from the perspective of our own self-interest that we unconsciously support policies that ensure our social, political, and economic dominance." This view provided by Tonry touches on the way in which white elites look out for their own best interests through the eyes and development of the white racial frame. This is relevant to the ways that Derrick Bell looks through his view on interest convergence. This view is represented in the following example by legal scholars Gross and Barnes:

As the level of the police officer's interest increases, the cost to the innocent citizen escalates rapidly. Its one thing to get a speeding ticket and an annoying lecture... it is quite another to be told to step out of the car and to be questioned... The questions may seem intrusive and out of line, but you can hardly refuse to answer an armed cop. At some point you realize you are not just another law-abiding citizen who is being checked out... like everyone else. You have been targeted. The trooper is not going through a routine so he can let you go... he wants to find drugs on you... Those of us who have not been through this sort of experience probably underestimate its impact. To be treated as a criminal is a basic insult to a person's self-image and his position in society. It cannot easily be shrugged off.... (Gross & Barnes, 2002).

The above example provides a clear view of an example of police officers view of blacks as criminal and a look into the interest of whites at the costly expense to blacks' self-

image. The lack of sympathy for blacks from the viewpoint of white police officers is due to the lack of experience they have had with a racial profiling encounter. The police use discretion to racially profile blacks as criminal and it is in his interest to demean them. The gain of interest for the officers is to demonstrate a dominant perspective of themselves while creating a self-image of criminalization and shame for blacks. These instances lead to a large amount in the disparities of arrest rates for blacks versus the rates of whites specifically as expressed in examples of drug offenses.

### **Arrest Rates**

According to the human rights watch and the sentencing project reports released May 5, 2008, the war on drugs was unjust to African American men. Current research demonstrates the statistical inequality in the unjust system by providing the difference in the arrest rates (drug related) between black and white men. The human rights review provided the following statistics, black men were imprisoned on drug charges 11.8 times more than whites. The rates of drug offenders sent to prison in 34 states showed African American men were imprisoned at much higher rates than whites. In 16 states the rates were between 10-42 times higher for African American sent on drug offenses (Human rights watch news, 2008). According to the sentencing project when examining drug arrests data in 43 of the largest cities in the nation between 1980 and 2003 the increase of arrests for drug offenses was 225% compared to a 70% increase among whites. This inequality in arrest rates can be directly associated with the police officers decisions being based from a white framing model perspective. The final aspect incorporated in racial profiling is statistical discrimination.

### **Statistical Discrimination**

Statistical discrimination is a central problem in racial profiling by the police. “If many young black men in particular neighborhoods, who adopt particular styles of dress, are involved in gang activities or drug dealing, police seeing a young man in that neighborhood who fits that pattern may believe it likely that he is a gang member or drug dealer and stop him, even if the individualized basis for a stop that the law requires does not exist.” (Tonry, 2010). Tonry argues, “Conscious stereotypes and statistical

discrimination no doubt play roles, especially in explaining police decisions to stop citizens on the street and judges' sentencing decisions to send people to prison they believe (often wrongly) to be dangerous." Tonry, suggests, unconscious stereotyping no doubt operates at the level of the individual case, and people with typical black features suffer as a result. All of these factors, however, are likely to be most important in individual cases and unlikely to be major causes of passage of laws and policies that treat black people especially severely. Tonry's view looks into police officers' misuse in discretion. However, he does not make the connection that this view and stereotypical findings result from police officers making discretionary decisions with the white framing model in mind.

Statistical discrimination is the belief that police officers are less concerned with the race of the individual and more concerned with the instrument (with is racially bias) is used in order to predict criminality. "However, police might also be racially biased in the sense that they care about race directly; for instance, they may derive utility from searching minority motorists, in which case statistical discrimination will lead them to search minorities at a higher rate than if they were unbiased." (Hernandez-Murillo, 2004). Many of the black officers interviewed by Bolton and Feagin (2004) stated they were stopped frequently by police officers due to their use of discretion when thinking outside of the white racial frame. One officer describes his encounter:

*"Every time I'd go through there (referencing his old neighborhood) I would get stopped, and the excuse was always "You were speeding a couple of miles back down the road; you mind if I look in your vehicle?" It was, you know, it was the same old line, "Go ahead, look, so I can get on." They looked through, search around, "All right, I'm not gonna write you a ticket this time; go ahead on." (Bolton & Feagin, 2004).*

This example provides a glance into the perception of police officers through statistical discrimination working from a white racial frame of mind. The officers were concerned with racial biases through the frequent stop of blacks including their own officers when they are in plain clothes. This statement also references the ability of the officer to use his discretion and not issue a ticket. In this case, he was thinking through the white racial



frame of mind. This officer also stated he would be stopped at the least monthly when he went to visit his old neighborhood due to his being a black man. Although he did not issue a ticket, the white officer succeeded at allowing the black man to see his authority while at the same time showing he (the black man) was inferior.

Piquero (2008) states there are a lack of analysis in the first stage of confrontation in the criminal justice system. He asserts the possibility remains that the system could in fact look at minority and white offenders in a different light. He finds that the contemporary bias could be a factor as well as the historical connection rooted from the past of racial inequality. In an interview conducted by Feagin in his systemic racism book, he discussed the encounter of a black respondents experience in 1970 when legal desegregation was supposed to be coming to the South. The respondent was in a restaurant with a white woman and got into an argument because he was there with her. The police were called to diffuse the situation. The black man stated:

*“They took me out to the woods to teach me a lesson.... I was scared to death. I’d be slammed around, slapped, and beaten....When I told my father they had taken me out to the woods, they denied it....” (Feagin, 2006).*

This account demonstrates both government and legal institutions have historically been dominated by whites and this dominance remains in place today. Making the instrument used in statistical discrimination racially bias. Many communities currently have problems with white law enforcement officers mistreating black residents. This mistreatment can effect decisions of officers to lean positive discretion to whites in a situation (by coming to their defense in a situation as shown above) and negative discretion to blacks demonstrated above through the punishing reaction to the black man.

Now that the discretionary power of the police officer has been addressed, it is now time to look into the discretionary power of the next level in the criminal justice system. The discretionary power of the prosecutor will be addressed.

## **Prosecutor Discretion**

The prosecutor plays a critical role in the criminal justice process. Research suggests they have power that can control the outcome of cases. The prosecutors' discretionary ideology is viewed as both positive (from the prosecutors' perspective) and negative (through their actions against blacks) power. Positively they (prosecutors) are given passes through legal rules such as the "harmless error rule." The negative aspect of this discretionary power through the white racial frame of mind leads to misconduct and miscarriages of justice for black defendants. These miscarriages are viewed through cases such as *United States v. Armstrong*, factors that have an influence on the prosecutor's decision making process (system factors, case factors, disposition factors, and political factors), and presidential pardons. We will begin by discussing the discretionary power the prosecutor holds.

### ***Power of the Prosecutor***

"Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official" (Davis, 2007). Prosecutors are positively affected due to a pass being given to them above other white social actors (judges, police officers). This pass is provided to prosecutors because they possess the ability to make fair and equitable decisions, this point is debatable. Angela Davis does a great job at disputing this claim. "If prosecutors always made decisions that were legal, fair, and equitable, their power and discretion would be less problematic. But, as has been demonstrated with police officers, judges, parole officers, and presidents, the exercise of discretion often leads to dissimilar treatment of similarly situated people" (Davis, 2007). Prosecutorial discretion is viewed positively because it is essential to the manner in which the systemic criminal justice institution operates. The prosecutor's ability to make discretionary decisions is critical. As discussed in the previous chapter, the prosecutor's duties include all-important decisions of whether an individual should be charged, which charges the suspect will face, if a person should plea, and if so how to plea bargain. If the accused chooses to

exercise his constitutional right to a trial, the prosecutor represents the state in that trial (Davis, 2007). At the trial, the prosecutor has an insurmountable amount of discretion.

### ***Prosecutorial Discretion***

There is an assumption after the police choose to arrest an individual and the suspect is brought to court the criminal process will be mobilized. However, this is rarely the case due to the power of prosecutorial discretion. The prosecutor decides if the case will be brought to trial, if charges are dropped in a process called *nolle prosequi* (defined in chapter II), or if the case is dismissed outright (as discussed in the previous chapter). The power of discretion used by prosecutors was reviewed in a classic study conducted in three countries by Barbara Boland. This study shows how prosecutors used this discretionary power to dismiss a high percentage of cases before they were brought to trial. The role of discretion provided by the prosecutor is broad, subject to few limitations, and often inserts the prosecutor in the position of making difficult decisions without appropriate policies and guidelines (Sienna & Siegel, 2008). In very rare cases, the prosecutors are accused of violating the constitutional rights of defendants.

The case of *United States v. Armstrong* demonstrates the violation of defendants' rights. Christopher Lee Armstrong and others were indicted on federal charges of "conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same. Armstrong filed a motion for discovery or dismissal. He alleged he was selected for prosecution because he was black. The District Court granted the discovery order. The court ordered statistics of similar cases from the last three years of cases that the government failed to prosecute others who were in similarly situated cases. The government indicated it would not comply. Subsequently, the District Court dismissed the case, there was an appeal filed by the government resulting in an affirmation of dismissal. It held that the proof requirements for a selective-prosecution claim do not require a defendant to demonstrate proof of the government's failure to prosecute others who are similarly situated. In an 8-1 decision, announced by Chief Justice William H. Rehnquist, the Court held that in order to file selective-prosecution claims, defendants must show the government has failed to

prosecute similarly situated suspects of other races. "If the claim . . . were well founded," wrote Rehnquist, "it should not have been an insuperable task to prove that persons of a different race were not prosecuted." (The Oyez Project at IIT Chicago-Kent College of Law, 2012). This case demonstrates the power of discretion of the prosecutor even when the case demonstrates the discretionary decision to try the case was based on white racial framing. This frame of thinking is apparent due to being chosen for trial by the prosecution due to the race of the defendant. The judges used their discretion in this situation to dismiss the case. This case shows how thinking from the white racial frame can affect decisions made. "These decisions result in tremendous disparities among similarly situated people, sometimes along race and/or class lines. The rich and white, if they are charged at all, are less likely to go to prison than the poor and black or brown—even when the evidence of criminal behavior is equally present or absent." (Davis 2007).

### ***Problems with Prosecutors' Discretion***

Insight on prosecutorial discretion and the reason it is so essential to have this power have been addressed. We will now address the problems that have resulted from the failure to monitor how that discretion is exercised. This chapter discusses the possibility of inequality that can be obtained when the use of discretion is employed. Prosecutors are not held accountable for their actions. They are provided avenues leading to self-regulation, despite such self-regulation being either nonexistent or woefully inadequate. Although minimal efforts have been made to promote the fair and equitable exercise of prosecutorial discretion (Davis, 2007). This is the result of the ability provided to the prosecutor to self-regulate the level of discretion they are provided to maintain. Their self-regulatory power has led to the use of the white racial frame of mind when making critical discretionary decisions. This power of the prosecutor and lack of punishments given are supported through the harmless error rule.

### **Harmless Error Rule**

Davis (2007) finds this rule is one of the possible excuses provided for prosecutors engaging in misconduct while still maintaining a successful outcome. This rule is seen as a reason misconduct of prosecutors continues. "Under the harmless error rule, appellate

courts affirm convictions if the evidence supports the defendant's guilt, even if she did not receive a fair trial. This rule permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed" (Davis, 2007). This rule can have a critical impact on prosecutors' actions. Insight was provided for the lack of limitations and punishment the prosecutor has when making discretionary decisions. Now a look into this prosecutorial discretion through the aspects of the white racial framing model will be detailed.

### ***Discretion Through the Frame***

Four factors have an influence on the prosecutor's decision-making process. These factors as listed by Senna & Siegel (2008) are system factors, case factors, disposition factors, and political factors. All of these factors encompass a level of the white framing as motivation for making discretionary decisions. The system factors include the discretion used by the prosecutor of when to file a case and when to dismiss a case. This allows the prosecutor the discretionary power to either press charges or turn the case to correctional authorities for a parole revocation hearing. At this stage, the prosecutors' view of the white racial frame is crucial. The prosecutor can at this point decide to dismiss cases that involve white defendants and continue with cases that involve black defendants. This will allow cases to conclude with the defendants incarceration even in the event the cases may look dropped. This contributes to the level of bias discretionary decisions made by the prosecutor still resulting in the mass incarceration of blacks.

Case factors involve certain factors that help the prosecutor decide to charge the defendant. Some of these factors include the availability of civil sanctions, the cost to prosecute the case, and the convictability of the case. The discretionary decisions based on convictability are important in this stage of the prosecutors' decisions. "Therefore, they may be unwilling to prosecute cases in which the odds of conviction are low. They are worried about convictability." (Senna & Siegel, 2008). When the prosecutor looks at cases to try through the eyes of the white framing model, they are aware a black defendant is more convictable than a white defendant is.

Disposition factors provide the prosecutor the option of deciding whether alternative actions are appropriate. The discretionary power used in this stage is known as diversion. Diversion is defined as “the use of an alternative to trial, such as referral to treatment or employment programs.” (Senna & Siegel, 2008). This decision made by the prosecutor can be detrimental to a defendant when the prosecutor is viewing them through the white framing model. The black accused suspect can find himself or herself going to court and not being provided this alternative option at the same rates as their white counterparts.

The political factors embody the role of the prosecutor in making discretionary decisions based on their position as a political figure. The prosecutor makes decisions based on shaping of prevailing political necessities. This factor is better defined through the situation of presidential pardons that express the discretionary decisions and power of the prosecutor for presidential pardons that have an effect politically.

### ***Presidential Pardon at Prosecutors and Judges Discretion***

The discretionary power of the prosecutor can be examined through the process of receiving presidential pardons. “White criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities, a ProPublica examination has found.” (Linzer & LaFleur, 2011). In multiple cases, where racial differences were found white and black pardon applicants received opposite outcomes. These opposite outcomes gave reason for pause because the offenders committed similar offenses and had comparable post-conviction records.

How does this relate to the discretionary process of the prosecuting attorneys and judges you ask? Applicants must endure a five-point process to receive a pardon. First, there is a five year wait after completing their sentence to apply. The next step the attorneys are allowed to consider the “conduct, character and reputation” of applicants after they have completed their sentences. This process is one of the key factors in how making discretionary decisions through the white frame of mind can be detrimental to black individuals. Due to the lack of a chart to define conduct, character, and acceptable reputation record of an applicant the discretion of the attorney is a key component. When

viewing cases through a white framing model of whites as superior and black as criminal can pose a problem.

The third step is based on the applicant's need. In the fourth step the opinion of prosecutors and judges are essential for acceptance of a pardon. This is filled with discretionary power. Especially when being pardoned or even considered by the president is in the hands of the opinions (at the discretion) of the judges and prosecutors. When viewing discretionary decisions that are primarily based on a system where these key decision makers are white, the white framing model view is important. The decision makers in the pardons office were all white. The office hired its' first black staff attorney in 2008 (Linzer & LaFleur, 2011).

After a scandal ensued from Judge Adams when looking into a case to provide a pardon Chibueze Okorie, a Nigerian-born minister who was loved by his Brooklyn congregation. His crime included facing deportation due to his 1992 heroin and intent to distribute conviction. Adams told colleagues according to a report from the Justice Department's inspector general "This might sound racist" but Okorie is "about as honest as you could expect for a Nigerian. Unfortunately, that's not very honest." (Linzer & LaFleur, 2011). This view came directly from the view of blacks as being criminalized, (as discussed in further detail in chapter II) a stereotype that is incorporated through the white racial frame aspect of the white framing model. Adams went further to support his frame of thinking to explain his discriminatory discretionary decision to deny Okorie's pardon. According to Linzer & LaFleur, 2011, when asked by the inspector general's office for an explanation he replied "Nigerian immigrants 'commit more crimes than other people' and that an applicant's nationality is 'an important consideration' in pardons, according to the report. "It's one the White House wants to know about," Adams told investigators." Adams comment is directly related to the criminal view of blacks that is obtained by white social actors. These views can and have adversely affected criminal decisions through our systemic racist criminal justice institution.

The final point is acceptance of responsibility for their crimes, remorse, and atonement. At this stage, the Pardons office lawyers obtain the power of discretion to decide if applicants are remorseful and are leading what is called a “stable” life. Thinking from a white frame of mind when deciding if the defendants’ life is “stable” can result in differential treatment for African Americans. Historically through this frame, blacks were viewed as criminal and inferior. In a 1690s preamble to South colony’s slavery laws elite white lawmakers remarked regarding enslaved people: “They are barbarous, wild, savage natures, and ... constitutions, laws and orders, should in this Province be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined.” (Feagin, 2010). When the thinking of white lawmakers is working through this mode of thought, they are less likely to determine blacks as living a “stable” life. This can make discretionary decisions of prosecutors at this level detrimental.

The judicial process has the least amount of discretionary power. However, the amounts of discretionary power provided can still have a critical effect for African Americans. This study will add to this discipline by providing a glance into an agency of the discretionary decisions through the white framing model that are rarely studied, judicial discretion.

### **Judicial Discretion**

The following example will provide a clear view of the judges’ use of discretion with the white racial frame of mind at the forefront. This power can be viewed as statistical discrimination (defined earlier in this chapter). Novelist Tom Wolfe in *Bonfire of the Vanities* (1987) describes the power of statistical discrimination when viewing a defendant’s appearance. This bias provides support of the standard of white racially framed stereotypes of the black man as criminal (as discussed in chapter II).

*“The lawyer for a young black defendant has tried, with some success, to persuade the judge that his client is a nice kid, young, impressionable, and salvageable; played a minor role in a street robbery; and deserves a break. Then the defendant appears. He had the same pumping swagger that practically every young defendant in the Bronx affected, the Pimp Roll. Such stupid self-destructive macho egos, thought Kramer [a*



*prosecutor]. They never failed to show up with the black jackets, the sneakers, and the Pimp Roll. They never failed to look every inch the young felon before judges, juries, probation officers, psychiatrists, before every single soul who had any say in whether they went to prison. . . . The defendant's comrades always arrived in court in their shiny black thermal jackets and go-to-hell sneakers. That was very bright too. That immediately established the fact that the defendant was not a poor defenseless victim of life in the ghetto but part of a pack of remorseless young felons. The defendant does not get the break." (Alexander, 2010).*

In the role of the judicial process, the judge is considered the senior officer in a criminal case. The judge during the trial rules on appropriateness of conduct, settles questions of presented evidence, settles questions of procedures, and guides the type of questions allowed for the witnesses (Senna& Siegel, 2008). The power of the judge to decide rules on appropriateness of conduct, to settle questions of presented evidence and procedures, and guiding the type of questions allowed for the witnesses is important. These powers allow the judge the opportunity to use their discretionary power through a certain level of bias. This level of bias can be viewed from the above statement. The judge has an idea of a criminal black man (based on white framing model beliefs) and has associated the defendants' appearance as well. With these white racially framed stereotypes in mind, the defendant is not provided a break.

The judge also has duties in a jury trial to instruct the jurors to ensure they are aware of the information to examine properly versus the information they need to ignore. The judge must provide the jury of points of law and evidence that must be considered to reach a verdict. In the event of a waived jury trial, the judge has the duty of deciding whether to hold for the complainant or the defendant (Senna& Siegel, 2008). If the defendant happens to be found guilty, the judge takes the responsibility of sentencing (in some cases the discretion is limited due to legislative determined mandatory sentencing). The judge has the discretion to choose the sentence, the length of the sentence, or the conditions if given probation in which probation may be revoked. These duties provided to the judges all have a level of discretionary controls. A level of bias is present when judges' rule using their beliefs related to the white framing model. The two trials forms

where discretionary power of judges is expressed are a jury trial and a bench trial. This discretionary power is now discussed.

### ***Jury Trial***

In the cases where the defendant chooses to have a jury trial there is a level of discretion used by the judge. After the case has been defended, the judge has the responsibility of providing instructions to the jury as they deliberate. In this process, the prosecutor and the defense attorney have the option to submit instructions for consideration. The judge uses his discretionary power to determine which instruction if any to use. These instructions cover applicable law however; a mistake of one word while giving these instructions can cause a subsequent appeal.

### ***Bench Trial***

Most criminal cases that are not settled through plea bargaining (discussed in chapter II) are heard formally by a jury. There are cases where the defendant exercises his constitutional rights to waive a jury trial and request a bench trial. A bench trial is “a trial of a criminal matter by a judge without a jury” (Senna & Siegel, 2008). In this trial, the judge hears the case and renders the verdict allowing him an enormous amount of discretionary power. This power when viewed through his perception of the white frame can be crucial for black men. The judge is allowed in these cases to dismiss the case, render a not guilty verdict, render a guilty verdict leading to sentencing the defendant as well, or determining a continuance of the case indefinitely. Another discretionary decision provided to judges is through sentencing models. Some of these models consist of indeterminate sentencing, determinate sentences, structured sentences, and mandatory sentence.

### ***Sentencing Practices***

The discretion of the judge to decide whether to consider the prosecutor and police officers plea for an amount of leniency or in some cases severity in sentencing lies in the discretion of the judge. This level of discretion used in sentencing through the white framing model was discussed in the following case:

The case of *McCleskey v. Kemp* regarding racial bias in sentencing was ruled on by The Supreme Court in 1987. The case challenged the death penalty in Georgia. Through a writ of habeas corpus, McCleskey based his argument because a statistical study had proven the imposing of the death penalty in Georgia was dependent on the race of both the victim and the accused. The findings of this study (conducted by Professor David Baldus) were when black defendants killed whites they received the death penalty eleven times more than others when killing black victims in the state of Georgia. Justice Powell found despite credible statistical evidence the sentencing cannot be challenged through the Fourteenth Amendment and Eighteenth Amendment without a level of clear evidence that a discriminatory act had consciously occurred. What came from this ruling, when the decisions were clearly coming from a white racist frame of thinking through the judges' discretionary lens? Michelle Alexander (2010) sums the findings as, "The Court's answer was that racial bias would be tolerated— virtually to any degree— so long as no one admitted it." (Alexander, 2010).

The amounts of discretion afforded judges when allowed to consider things when implementing sentencing can be detrimental as seen in the above-mentioned case. They may consider the background of the defendant and provide a sentence that is lighter in cases they believe warrant this option. This is the point where the discretionary decisions of judges based on the amount of racial bias due to their belief in the white racial frame of mind is crucial. "Less serious cases thus "liberate" judges to use their discretion and also, perhaps, to base sentencing decisions on racial prejudice" (Barkan, 2009). Some research has explicitly examined the possible biases of judges when sentencing cases. Jeffrey Rachlinski and his colleagues recruited 133 judges from three jurisdictions to take implicit bias tests. They were asked to, hypothetically, sentence cases when the race of the defendants varied. The test, as expected, revealed there is an implicit amount of biases against blacks among white judges. The pattern among black judges showed no clear pattern of biases. Based on the sentencing exercise there was a statistically significant (though not large) relationship between individual judges' biases and the sentences they would impose. This study supports how judges' discretion can be bias.

This study however does not discuss the thinking behind these sentencing exercises. The view of black men through the white racial frame (as discussed in detail in chapter II) provides foundational support for reasons these discretionary biases in this study occurred. The first form of sentencing where the judge has an amount of discretion to be discussed is indeterminate sentencing.

### **Indeterminate Sentencing**

This form of sentencing is most widely used in the United States criminal justice system. “Indeterminate sentencing is a term of incarceration with a stated minimum and maximum length; the prisoner is eligible for parole after serving the minimum.” (Senna & Siegel, 2008). This level allows the sentencing to be based on judicial discretion as well as a level of requirements through the correctional agency. The sentence term provided to the defendant as a legislative minimum and maximum sentence for the crime committed. This sentencing provides flexibility in making a discretionary decision by the judge. This level of flexibility is composed of leniency in both the type and length of the sentence imposed. Senna & Siegel state, “Most jurisdictions that use indeterminate sentences employ statutes that specify minimum and maximum terms but allow judicial discretion to fix the actual sentence within those limits.” The possibilities for the white racial frame of mind being incorporated with the systemic racist institutions in place are found here. The allowance of judicial discretion to determine the minimum and maximum sentence can open a level of differential treatment. The white framing model mode of thinking from the judicial discretionary perspective can allow black defendant provided the maximum sentences. In instances when the same crime is committed by a white defendant, the judge can choose to sentence the defendant to the minimum allowance.

The systems in place are systemically racist (as discussed in the previous chapter.) The allowance of indeterminate sentences can produce racial disparities. Research suggests indeterminate sentencing limits the amount of full discretionary power from the judge. Although this has some validity, there is also a conflicting argument that this power is in the hands of correctional framework that has a foundation backing in racial

inequality. Due to the debate of the possible disadvantage to some defendants (blacks) versus preferential treatment for (whites), some states have decided to incorporate determinate sentences as an alternative.

### **Determinate Sentencing**

Determinate sentencing is “a fixed term of years, the maximum set in law by the legislature, to be served in its entirety by the offender sentenced to prison for a particular crime.” (Senna & Siegel, 2008). The difference between these two types of sentencing (indeterminate and determinate) are determinate sentencing does not allow for a benefit of parole. However, determinate sentencing does allow for “time off for good behavior.” This is seen as a form of structured sentencing practices. A more detailed view into structured sentencing will now be discussed.

### **Structured sentencing**

This level of sentences involves guidelines when determining sentencing for a defendant. These guidelines vary primarily by state and federal guidelines. Federal guidelines provide the option for judicial discretion. There are specific components that are calculated (example, points can be added to the use of a weapon, the amount of injury the victim incurred, or for a large amount of money taken during the crime) these points help the judge to determine from the chart the possible sentence that the defendant deserves. According to Senna & Siegel (2008), the judge consults the sentencing chart to determine the amount of months the defendant should serve.

This is where the judge is allowed a level of discretion in determining a sentence for the defendant. The chart allows the judge to determine the particular sentence that should be applied to the offender. This can be detrimental for black offenders. When viewing these defendants through the white racial frame the judge can add points because they view the offender as “vigilantly” versus a “victim,” which are factors that help determine the amount of points given for the crime committed. This allows judges the options to use their own discretionary levels to determine the points given to increase the sentencing per defendant. Research suggests, evidence exists the interpretation of different judges provide a difference in how the guideline in cases are applied.

This is where an amount of disparity can be found. The difference between the sentencing guideline between crack cocaine, (predominately found in black communities) versus the sentence given for cocaine (predominately found in white communities) is apparent. In, 1986 Congress passed the Anti-Drug Abuse Act. This act established mandatory sentences for possession of crack cocaine by low-level dealers that were lengthy. This act takes a level of discretion from the judge by adding a mandatory sentence for this crime. This act requires a minimum of five years in prison for 500 grams of cocaine. The differential treatments for these drugs are apparent. The minimum sentence for selling 500 grams of cocaine is the same sentence if a defendant is found with just five grams of crack. This act supports mandatory sentencing that takes the amount of discretion from the hands of the judge. Although there are less amounts of discretionary power from the judges' perspective the power to discriminate through the white framing model lies in the hands of the systemic racist justice system. This Act was passed demonstrating the use of systemic racist institutions in implementing white racist and bias laws.

### **Mandatory sentencing**

What is mandatory sentencing? "Mandatory sentencing is a statutory requirement that a certain penalty be set and carried out in all cases on conviction for a specified offense or series of offenses." (Senna & Siegel, 2008). This sentencing process eliminates a level of discretion from the hands of judges. "More than 35 states have replaced discretionary sentencing with fixed-rate mandatory sentences for such crimes as sale of hard drugs, kidnapping, gun possession, and arson." (Senna & Siegel, 2008). Mandatory sentencing results from an effort to limit the amounts of discretion provided to judges while simultaneously getting tough on crime (this will be discussed in further detail in chapter IV). Although mandatory sentencing is in place to help with discretionary inequality research finds there is still a level of discriminatory problems in mandatory sentencing.

## Conclusion

This chapter discussed the discretionary power used by social actors (police officers, prosecutors, and judges) through the white framing model. The power of police when using discretion was described as personal discretion and being a critical aspect for a police officer as a daily task. Focus was provided on these discretionary decisions being made through the white racial mode of thinking. This thinking is described as how officers decide which suspects are provided the option to go home (white offenders) versus which suspects they choose to arrest (black offenders). This chapter focused on the influences of police —the rule of law, their involvement in SWAT teams, stop-and-frisk rights, driving discretion, racial profiling, and racial disparities— being guided through the white framing model and leading to (negative) consequences for blacks due to the types of discretionary actions taken by police officers. These consequences are visible in the inequality of arrest rates and statistical discrimination.

The discretion of police was discussed as questionable. This led to the notion of the “rule of law”. The objective of this rule was described as a system in place to construct an arrangement of objective and accessible commands. This law was used to diffuse preferences and discretion used by people in positions of power on an individual basis, and to providing a collective agreement. Swat teams were discussed as a common factor in the criminal justice system. Today their most common use is by police officers to serve warrants for drug offenses. Although they were originally invented to handle hostage situations this chapter showed how police use this method to target blacks disproportionately. The stop and frisk program was discussed. An example provided in the case of *Florida v. Bostick* demonstrated the negative consequence for a black man when white police officers were using the white racial framed discretion. Bostick was discussed as not a suspicious person unless an officer was viewing things from a white racial frame of mind. He was a black man delegating a badge of a suspicious criminal when making discretionary decisions through a white framing model.

This chapter also discussed a challenge regarding black youth of all classes being racially profiled by police and anyone else who wants to target black youth. The findings

showed black parents must teach their youth the proper protocol when they are stopped by law enforcement for “Driving while black” or “Walking while black.” This protocol includes not arguing with the police officer no matter how disrespectful he is being to you, do not make any sudden or quick moves, and keeping their hands visible at all times. These finding supported the influences on white police officer when looking through the white racial frame.

This chapter found, although he (police officer) has that knowledge that any individual can commit a crime the officer still proceeds to make the discretionary decision to look closer and potentially stop the car with the black men due to everything (the media, systemic racist institutions, and the white racial frame) telling him that black men are bad. Racial disparities were discussed with the association to Derrick Bell’s interest convergence. The gain of interest for officers when using discretion through the white framing model is to demonstrate a dominant perspective of themselves while creating a self-image of criminalization and shame for blacks. A glance into these instances was stated as leading to a large amount in disparities of arrest rates for blacks versus the rates of whites specifically as expressed in examples of drug offenses. Statistical discrimination was also discussed as another consequence of the misuse of police discretion. A glance into conscious stereotypes and statistical discrimination by police was argued as playing a role, especially in explaining police decisions to stop citizens on the street they believe (often wrongly due to thinking from the white racial frame) to be dangerous.

The discretionary thinking from the white framing model of prosecutors through the systemic racist institutions was also discussed. The prosecutors’ discretion was noted as having the option to decide if the case will be brought to trial, if charges will be dropped in a process called *nolle prosequi*, or if the case will be dismissed outright. The prosecutors’ role was also described as the most powerful official in the criminal justice system. Their everyday decisions were discussed as having control of the direction and outcome of criminal cases. This chapter discussed four factors that have an influence on the prosecutor’s decision-making process, system factors, case factors,



disposition factors, and political factors. Case factors were discussed as prosecutors' involvement in certain factors that help them decide to charge the defendant. This discretionary power was argued as prosecutors look at cases through the eyes of the white racial frame. Due to the importance of convictability, they were more likely to charge the black defendant. Disposition factors were discussed as the possibility of a prosecutor to provide an alternative option instead of prison. According to examples provided, when this decision made by the prosecutor is made from the white framing model it was said to be detrimental to a black defendant. The black accused suspects can find themselves going to court and not being provided this alternative option at the same rates as their white counterparts. The political factors in making discretionary decisions based on their position as a political figure was discussed. These views were stated as having adversely affected criminal decisions through our systemic racist criminal justice institution. The example provided of the discretion through presidential pardons demonstrated the racial disparities when making these decisions by prosecutors through the white racial frame.

The discretionary thinking through the white framing model by judges was also discussed. In the role of the judicial process, the judge was argued to be the senior officer in a criminal case. The judge was discussed as having the discretionary power to decide the appropriateness of conduct, settling questions of presented evidence, settling questions of procedures, guiding the type of questions allowed for the witnesses, choosing the sentence, the length of the sentence, or the conditions if given probation in which probation may be revoked. These duties were discussed as providing the judges an amount of discretionary control. According to this chapter there remains a level of bias that can be present when the judges rule using their biases and beliefs that are related to the white racial frame. The judges' discretionary power in bench and jury trials was discussed. Discretion from the white framing model in sentencing was also discussed. This study discussed the thinking behind these sentencing exercises. The allowance of judicial discretion to determine the minimum and maximum sentence was stated as opening a level of differential treatment. The view of black men through the

white racial frame was provided as support for foundational reasons these discretionary biases in this study occurred. Structured sentencing was also discussed. The example provided was the 1986 Anti-Drug Abuse act. This act was argued as establishing mandatory sentences for possession of crack cocaine (predominately found in black communities) by low-level dealers that were lengthy. The allowance of mandatory sentencing opens the door to the three-strike laws and truth in sentencing laws (both will be detailed in chapter IV) that are in place today in the role of mass incarceration.

## **CHAPTER IV**

### **MAIN IMPACT OF DISCRETIONARY DECISIONS**

The amounts of people who enter prison at disproportionate rates are noted by some to be a result of differential exposure to the surveillance by police. Bridges & Steen (1998) have also conducted research on rates of convictions that have unequally affected black men. This disproportionate rate of surveillance increases the likelihood charges will result in convictions due to prosecutors discretionary decisions (as discussed in the previous chapter) resulting in convictions. Steffensmeier (1998) has conducted research to support differences in sentencing patterns. The obvious difference in sentencing patterns leads to the last level of inequality from the judicial standpoint on unequal discretionary decisions (discussed in chapter III). These findings in the current literature show a direct impact felt by black men through the differential discretionary decisions of white powerful actors leading to mass incarceration.

This chapter will examine some of the broader consequences of criminal justice system discretion in relation to the vast penal system in the United States. A view into differential punishment (Emmett Till's punishment versus the punishments of both Bryant and Milam) from a historical standpoint will be provided as foundational for the criminal justice system that remains in place. This view will provide insight into the effect of inequality in the criminal justice system when discretionary decisions result in differential discriminatory punishment. A historical view of the consequences (lynching) for blacks when powerful whites make discretionary decisions of justice will be addressed. These consequences include growing inequality for black people who are chosen (through inequality in discretion from the white framing model) to serve time, and the phenomenon of governing through crime with use of three strikes law, tough on crime, and truth in sentencing. It concludes with a small synopsis of the impact and historical view of the effect of discretionary decisions that were rooted from a white racial frame of mind in relation to the war on drugs. The first look into these consequences is to look back at the historical impact of inequality.

### **Historical Impact of Inequality Through Discretionary Decisions**

The following quote will show the historical connection of the white racial frame being implemented through the systemic racist institution of the criminal justice system that is still currently in place today.

Goluboff (2007) explains: When the Klu Klux Klan, often with the acquiescence of law enforcement officers, lynched black men and women, they enforced Jim Crow. Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.

The historical impacts of these actions were deaths of African Americans through lynchings due to the discretionary decisions of millions of whites through the white racial frame of mind. These matters were viewing black men through a criminal lens (white framing model) by whites. Whites have received lesser punishments for more extensive crimes historically. This frame of punishment is still in place in the unequal criminal justice institution in place today. The blacks, predominately men, that were lynched were often hung because they were suspected of committing a crime. Many of these “crimes” involved illegal or otherwise white-condemned acts of looking, gawking, and whistling at white women. The legal realm of things was handled against blacks at the hands of whites’ manmade criminal justice system. This view is best described through the case of Emmett Till.

Crowe (2002) explained the story on his documentary of the lynching of Emmett Till. Emmett Till, a 14 year-old black boy from Chicago, came to visit relatives in Money Mississippi on August 20, 1955. Emmett in an attempt to show off for the southern boys bragged about encounters back home with a white girl. The southern boys in an attempt to challenge his accounts asked him to enter the nearby store and flirt with the white store attendant. According to witnesses as Emmett left the store he turned to the white attendant and said “Bye, baby” followed by a whistle. Three days later Roy Bryant, husband of the store attendant, recruited the assistance of his half-brother J.W.

Milam in a quest to “teach the boy a lesson.” According to Emmett’s great uncle Mose Wright telling reporters “On Sunday morning about 2:30, someone called at the door. And, I said 'Who is it,' and he said, 'This is Mr. Bryant. I want to talk with you and the boy.' And when I opened the door, there was a man standing with a pistol in one hand and a flashlight in the other hand." Bryant and Milam forced their way into the back bedroom where Emmett was sleeping, and after making sure he was the one "who'd done the talking at Money," they marched him outside to their car.” (Crowe, 2002). Three days after this incident the body of Emmett Till was found battered in the Tallahatchie River. Both Bryant and Milam were charged and acquitted for the kidnapping and murder of Emmett Till. The body was later displayed at his funeral in Chicago by his mother in an open casket for people to see the effects of the justice administered by the whites in the South to her 14-year-old son.

This act demonstrates a historical standpoint of whites taking the position of police officer, prosecutor, and judge when making discretionary decisions of punishment. The crime committed by Emmett Till (whistling at a white woman) was punishable by death. The murder of Emmett by both Bryant and Milam received no punishment. This component is important because it provides a view into, the not so new, consequences for black men when whites make discretionary decisions through the white racial frame of mind and find themselves supported from the systemic racist institutions. Blacks find themselves being judged, prosecuted, arrested, and at liberty to punishments fully of the law. However, whites find themselves receiving a punishment that is minimal and at times (as in the Till case) no punishment at all. These punishments are clearly made from discretionary decisions of whites from a white racial frame of mind. This frame includes blacks are criminal while whites are pure (not capable of committing a crime) and superior. This example provides insight into this studies claim that historically as well as currently there is a level of inequality and differential punishments given to blacks in relation to the punishments received from their white counterparts. The comparable nature of whites when making discretionary decisions grounded in the white racial frame (whites being superior and blacks being inferior) are felt today. This level of

inequality is expressed when discretionary decisions are made from all three power social actor positions. A clear-cut definition of inequality in the law will now be provided.

### **Inequality**

There is a law that states opportunities and equity are provided to all people. However, when this doctrine is viewed from a reality standpoint the discretion of making laws and acting from a criminal justice point of view are delivered in an inequitable fashion.

*“The doctrine of “equality before the law” is an ideal firmly entrenched in American legal culture. It establishes the principle that no person or class of persons may be subjected to discriminatory or arbitrary treatment. Justice is to be dispensed only with regard to those considerations explicitly embodied in law. However, is this ideal actually reflected in criminal justice practices? A common assertion among social scientists is that it is not.” (Miethe & Moore, 1986).*

Although the above quote hints at the expectation of following the doctrine of the “equality before the law,” this view is contradictory to reality. There are ranges of discretionary decisions that support inequality when decisions are being made from the white framing model. These sections of inequality can lead to detrimental effects for black men. When viewing these aspects through possible unequal decisions of police officers’ discretions, attorneys’ discretion, and judicial discretion is important when view inequality in light of a systemic racist criminal justice institution.

The inequality through police discretion can be best expressed through the view of racial profiling which leads to discretionary decisions that affect black men at a largely disproportionate rate. The inequality expressed through police and traffic violations being racially motivated are important. As discussed in the previous chapters racial profiling, disparities, and driving while black are crucial in discretionary decisions made by police officers. The incorporation of these (traffic violations) at disproportionate rates of discriminatory discretionary decisions through the white racial frame of mind is

important. In relation to experiences of inequality, the best explanation is through decisions made during traffic stops.

### ***Inequality and Police Officers Discretion***

Police officers have the ability to determine whom among the many violating the traffic laws can be stopped and arrested. This ability allows officers to stop speeding drivers based upon the racial makeup of the individual. The *Whren v. United States* (1996) case has had a tremendous impact on the inequality in discretionary decisions made by police officers that significantly affect African American motorists. In the case while patrolling a “high drug area” two officers noticed a truck stop at a stop sign for a little over twenty seconds and then speed off. The officers’ asserted a traffic violation had been committed which consisted of “stopping too long at a stop sign.” Upon approaching the truck, the officers noticed Whren (the passenger) was in possession of cocaine. He was booked and indicted on federal drug charges. Prior to trial, Whren filed a motion to suppress evidence stating the stop was unjustified because there was no reason to suspect, nor probable cause to assume he was engaging in illegal drug activity. His motion was denied by both the trial and appeals court and he was convicted. The officers in this case hid behind the fact that a traffic violation (stopping too long at a stop sign) was committed. This was used as the reason the black men were stopped despite the officers patrolling a “high drug area” hoping to catch a case. When viewing this case the officers are hiding behind this fact. The black men would be less likely to have been stopped for this minor traffic infraction in the event they were white, in a mall, or in an upscale black neighborhood.

James L. Brown and Michael A. Whren, who were black men, contended police officers made their discretionary decision to stop them based on a violation of the equal protection clause. The equal protection clause is to stop police officers from unconstitutionally selecting to enforce the law based on the consideration of one’s race. This clause was noted as deterrence from intentionally discriminatory application of the law. The position of an officer when viewing people from a white racial frame of mind makes the application of this clause not only impossible but also highly unlikely in cases

involving black men. These results in a violation of equality. This violation can be viewed through the police officers thinking from the white framing model. These men would be less likely to be subjected to probable cause and suspicion had the officers not been viewing these black men through the white racial frame of mind. This frame of thinking by the officers allows them to view these black men, in a known “high drug area, as criminalized and possible suspects.

This case is important because when viewing what we have learned from the possible unequal treatment when looking through the white racial frame of mind there is one assumption we can make. The suspects in the Whren case would not have been suspected or pulled over for suspicion and probable cause at the officers’ discretion if they would have been white. The findings in this case were supported by a number of studies that deemed the same results of inequality in discretionary decisions made by police officers. These cases include but are not limited to *Fuchilla v. Layman (1988)*, *State v. Pedro Soto (1996)*, *Lundman and Kaufman (2008)*, and *Smith and Petrocelli (2001)* to name a few.

The inequality through prosecutors discretionary decisions will be explored through decisions made regarding the convictability of black men. Prosecutors have been discussed as choosing harsher punishments for black men versus white men due to the successful convictability of black men. This inequality through the discretionary power of the prosecutor to decide whether to bring about charges will be explored.

### ***Inequality and Prosecutors Discretion***

Prosecutors have the discretionary power to decide whether to bring charges and whether to enter into a plea bargain. “Many prosecutors exercise their charging discretion to target only those draft dodgers who are vocal in their opposition, in an effort to suppress dissent. May they exercise their discretion to investigate and prosecute only African Americans for cocaine trafficking offenses because they believe that African Americans are more likely to be convicted?” (Tokaji, 2003)

This quote focuses on the easy convictability of black men when choosing to prosecute. The convictability of African American men being more successful is not



only relevant in cases of drug convictions (as noted in the above quote) but all cases. The convictability status that is viewed through the white racial frame of thinking of the prosecutors has a major impact on their decision to try African American men when looking into discretionary decisions (as discussed in detail in chapter III on convictability). The white framing model supports the aspects of the frame that describes black men as criminal, lazy, and dangerous. When prosecutors look into these aspects the chance of obtaining a conviction for black offenders has a high possibility of resulting in a successful conviction. This could trigger prosecutors to make the discretionary decision to charge the black man.

In a case in upstate New York the prosecution of Sammy Thomas and his brother Willie Gene, both African-American men, prosecutors won convictions despite a secret eyewitness statement from the victim's brother exonerating the men of the crime. This statement asserted the actual killers were white. The defendants' cases were appealed and they were later exonerated of all charges. These cases as well as others were the focus of possible misconduct of the prosecutors that also demonstrate a considerable amount of inequality. When prosecutors are looking through the white racial frame of mind despite evidence from none other than the victim's brother, claiming the real assailants were white, knowing the frame of mind (of the prosecutors) and conviction success of charging black men the prosecutor at that moment made a fatal (for Sammy and Willie Gene Thomas) decision. The prosecutor made the discretionary decision to charge the black men with the murder even though they were not the actual assailants of the crime. This is a clear-cut classic example of the white framing model. In support of the frames views of the black man as criminal, and their (Sammy and Willie gene Thomas) lives as less valuable than the life of a white man regardless of the black men being innocent of the crime committed.

The inequality through the discretionary power of the judge is also critical. The discretion of the judge to sentence a black man for committing a crime against a white person at a higher and harsher rate notes the level of inequality when exercising their

discretion. Inequality through the judicial sentencing process as a possible function of judicial discretion will now be debated.

### ***Inequality and Judicial Discretion***

When challenging the belief of the judge's decisions from the white racial frame of mind, which deems black life as less valuable than white lives, shows through the discretion of the judge when providing harsher sentences. This quote can help to support this notion. "Judges determining what sentences should be given to people convicted of crimes. Many judges give enhanced sentences to those who harbor political views hostile to the United States Government?" (Tokaji, 2003). As the quote states, although vaguely, when judges are using their discretion to determine which sentences to give (those who harbor views hostile to the United States Government) the black men due to his disconnect with the power of the government will be provided a harsher sentence. When viewing cases from the white framing model the sentencing of the judge in a case where the suspect is a black man and the victim is a white person makes the ruling more likely to be in favor of the death penalty for the suspect. This is a critical aspect in the area of inequality when making discretionary decisions from the white racial frame (whites are superior and blacks are inferior). The view of the quality of life of a white victim being more precious than the life of a black man who is valued not only at a lesser standard but also as equivalent to an animal (as discussed in both previous chapters through white racial frame of mind). This view is supported from the historical white racial frame provided in the first chapter that stems from the views of black from the days of slavery in which black people were considered property. Research suggests, today we view capital punishment as more acceptable for blacks versus whites in the eyes of white powerful social actors when making discretionary decisions through the white framing model. Through the years of lynching, to Jim Crow laws, to the current criminal justice system, punishment has always been deeply rooted and impacted by race. Unfortunately, the days of racial bias in the administration of justice in sentencing are not a remnant of the past.

The case of *Wesley E. Baker v. State* is an example of a case that demonstrates the lack of concern of sentencing a defendant in a fashion that can be deemed as cruel, unusual, and unequal. Baker, a black man, approached Jane Tyson, a white woman, after leaving the Westview Mall in Baltimore. Tyson was with her two grandchildren when Baker approached them with a pistol in hand, as they (Tyson and her grandchildren) entered the car in the mall parking lot. Baker, put a gun to Tyson's head and fired once, killing her. He (Tyson) then fled the scene in a blue truck after snatching Tysons' purse and wallet. A witness to the crime followed the truck out of the parking lot and made note of the license plate number, returned to the mall and informed the police. Upon apprehending the vehicle, Baker fled on foot. Upon apprehension there was a bloodstain spotted on his shoe, sock, and leg. Subsequent testing of the blood revealed the findings were a match to Tyson. Upon search of the path of flight taken by Baker when exiting the vehicle to flee Tyson's purse and wallet were also found.

There was an appeal filed to overturn Baker's death penalty conviction based on the argument the death penalty was not only cruel and unusual punishment, but also this form of punishment is deemed racist in cases such as Bakers' (a black person committing a crime against a white victim). There was also an argument by Bakers' attorneys that he had mitigating circumstances that made his case eligible for his sentence to be overturned and commuted. The evidence argued was the sentencing judge failed to hear details of Bakers life that would have allowed for a sentence of life without the possibility of parole instead of death. Bakers' mother was a victim of rape and impregnated with him at the age of 12 or 13. He also suffered a tremendous amount of both physical and sexual abuse as a child and experienced a drug overdose at 12 years of age. A federal judge rejected arguments to overturn his conviction and Bakers was executed in December of 2005.

This case provides insight into the discretionary actions of sentencing and appeals when judges demonstrate a lack of compassion for a black defendant viewing cases through the white framing model. In cases with white defendants research has found judges take a more human point of view by taking into consideration their (whites)

mitigating circumstances (bad childhood experiences) when allowing for leniency in sentencing. When the judge viewed Baker through the white racial frame of mind, as a criminal black man, he was given the punishment fully of the law.

The power of discretion was shown as important and crucial to the outcome of cases when looking into the inequality in the criminal justice system. Now that we have looked at the consequence of inequality through discretionary decisions we will look into another consequence. The result of inequality can lead to the path of incarceration as a deciding punishment from all levels of power. When discretionary decisions are made from the white framing model, blacks are inferior and whites are superior, the decision to incarcerate has led to a disproportionate amount of blacks in the prison system. This new system referred to by many as mass incarceration. Let us look into the current research on mass incarceration and the missing pieces from which my previous chapters have provided insight. A few examples will be provided as well as a connection to my contribution to the field thus far. The previous chapters have provided the addition of a foundational connection to systemic racism, fully indicted powerful whites, while providing insight into their white racial framed manner of thinking. Now a look into the consequence of mass incarceration, the current form of covert slavery, will be discussed.

### **Mass Incarceration**

Today the United States is the world's warden, incarcerating a higher proportion of its people than any other country. A staggering seven million people—or one in every thirty-two adults—are either incarcerated, on parole or probation, or under some other form of state supervision (Bonczar, 2003). “These figures understate the enormous and disproportionate impact that this bold and unprecedented social experiment has had on certain groups in US society. If current trends continue, one in three black men and one in six Hispanic men are expected to spend some time in jail or prison during their lives (Bonczar 2003).

“Group differences in violent crime do not explain racial disparities in prison. What does explain them is a combination of police practices and legislative and executive policy decisions that systematically treat black offenders differently, and more severely,

than whites.” (Tonry, 2010). Although Tonry touches on the differences for racial disparities in arrest rates being due to police practices and differential policy decisions he does not specifically address whom the decision makers are. The powerful white minds behind these decisions have been an added component to the discipline from my research. I will further address through the remainder of this chapter the important role of the decisions through the white framing model by continuing to indict these actors. There will be a provision of firsthand accounts of the manner of thinking from the policies and discretionary decision makers (judges, prosecutors, and police officers) from the systemic racism point of view.

Current research has discussed the impact of mass incarceration while failing to, provide a foundational connection to systemic racism, fully indict powerful whites, and neglecting to look into their white racial framed thinking. Some examples are as followed.

Loury has written, “Mass incarceration has now become a principal vehicle for the reproduction of racial hierarchy in our society” (Loury & Western, 2010). Loury discusses how mass incarceration has become a way that whites have established and continue to hold their stance in the racial hierarchy that is in place. However, he lacks the foundational connection between mass incarcerations through the systemic racism attributes that effect the discretionary decisions of powerful whites in the criminal justice system.

More recently, Wacquant has explained how that happened: “Unlike Jim Crow, the ghetto was not dismantled by government action. It was left to crumble onto itself, trapping lower class African-Americans in a vortex of unemployment, poverty, and crime, abetted by the joint withdrawal of the wage-labor market and the welfare state. . . . As the ghetto lost its economic function and proved unable to ensure ethno racial closure, the prison was called upon to help contain a population widely viewed as deviant, destitute, and dangerous” (Wacquant, 2010). Although he looked into factors that connect the system going from Jim Crow to mass incarceration he does not fully

indict the white social actors discretionary actions as the reasons blacks have found themselves trapped.

Tonry adds, “This pattern reinforces the claim . . . that one major function of the criminal justice system is the regulation and control of marginalized social groups such as African Americans” (Tonry, 1994). Tonry (2010) argues, “White Americans are influenced by stereotypes of black criminals, as the research on colorism, Afro-American feature bias, and implicit bias shows and, as the research on public opinions and attitudes shows, overtly racist attitudes have been replaced by racial resentments, which are the single most powerful explanation for why many more whites than blacks support harsh criminal justice policies.” Tonry neglects to add the reasons whites believe and feel in the manner that they do. My research provides the foundation explanation through the views of Feagin, Bell, and Nunn to demonstrate why and how the powerful whites have manipulated the belief system of the criminal justice system currently in place. These actors (police officers, prosecutors, and judges) have and demonstrate their power of discretion through the inequality in the distribution of justice.

The current research as discussed above lacked a clear connection and understanding of the consequence of mass incarceration. A clear-cut understanding of mass incarceration is important. The following sections will provide a deeper look into the consequence of mass incarceration from the white framing model through discretionary decisions. This understanding must draw a connection of mass incarceration by looking back. This historical aspect is important to connect the historical discretionary decisions (by white people in power) as similar to the decisions currently being made.

### ***Understanding Mass Incarceration***

The view of discretionary decisions being made from the minds of powerful white social actors is critical to understanding the phenomenon known as mass incarceration. How are we to understand this crisis now known as mass incarceration? When we view this perspective there is a need to focus on three critical factors that stand out. Those factors are the discretionary decisions made from the white powerful social actors in the criminal justice process. They address how these decisions are made through the white

framing model. These factors are the historical connection when making decisions, tough on crime laws (three strikes...), and the war on drugs. At first glance, these three factors may not stand out. However, this study will focus on not only the impact discriminatory discretionary decisions have, but also how they affect black men. There will also be an eye opening view of the criminal justices system's goal to not only act through the white framing model but also to maintain a level of white power through the creation of laws that are discriminatory in nature at the expense of black men. In order to accomplish a goal the following section will begin with a more intense (than the look provided earlier in the chapter) look into a more recent account and historical connection to mass incarceration.

### **Historical View / Civil Rights Connection**

A connection to the same historically racist incidents are found in current cases leading to mass incarceration and holding the same punishments as slavery are important.

*“Simply put, mass incarceration ultimately rests on the notion that African Americans need to be incarcerated in historically unprecedented numbers because of a moral breakdown in their communities that has resulted in a significant increase in serious crime.” (Kennedy, 2009).*

The massive mobilization in 2007 was made through the riveting national attention on the disproportionate impact of African Americans through the impact of Jena 6. On behalf of the Jena 6 in Louisiana, the NAACP has stepped against disproportionate rates and white racially framed thinking through unequal discretionary systems as in the results of Jena 6.

Kennedy (2009) described the case of the Jena 6 in detail. The case of the Jena 6 is regarding six black Jena high school athletes that were arrested in December of 2006 after a school fight. In this fight, a white student suffered multiple bruises. Upon release from the hospital (with a mild concussion) shortly after the attack the student later attended a school function the same evening. The six black students were later charged

with attempted second-degree murder and conspiracy. They were facing a sentence of up to 100 years in prison without the possibility of parole. The Jena 6, as they have come to be known, ranges between fifteen to seventeen years of age. The origins of this story can be traced back to an incident in early September 2006. A black high school student asked to sit under a tree in the schoolyard where only white students were permitted to sit. The following day, three nooses were hanging from this tree. This incident was considered a prank by the school and the three white students whom hung them (the nooses) were given a three-day suspension. These students were reprimanded and returned to school without notifying parents of the incident. A few days after the nooses were hung the black students decided to protest. According to the students this protest began with one black student stating, "I will go stand under the tree if you do," and one by one the students stood under the tree. The school reacted by calling the police and the district attorney. A much harsher manner of reacting than the way in which the white students were reprimanded for hanging nooses was applied. This harsher punishment attests to support the previous discussion (inequality and prosecutor discretion and inequality and judicial discretion) regarding the inequality and harsher punishment received by blacks versus their white counterparts. These actions are reasons for mass incarceration of black men. The six black students involved in the Jena six attacks were charged with attempted second-degree murder and conspiracy to commit murder. These charges leave the black student athlete with the possible sentence of twenty and one hundred years in prison.

The previous incidents were race related. In October, a black student was beaten when entering a private party that was determined to be an all-white party. Later in the month, a gun was pulled on black students at a gas station by a white student. The student claimed his action was in self-defense. Upon wresting the gun from the white student, the black students reported the incident to the police. The black students received charges for both assault and robbery of the gun. The white student was never charged. The next incident in November was the Jena 6.



Despite the charges of the six black athletes only being allegations, the local newspaper printed the acts as fact. The district attorney, Reed Walters, released a statement in which he said, "When you are convicted, I will seek the maximum penalty allowed by law." This case later received national attention and definite response to the white racially institutionalized criminal justice system we have in place today. This view being captured by one of the parents of a black student involved in the Jena 6.

"They want to take these kids — my son, as well as all these other children — lock them up, throw away the key. You know, that's a tradition for black males. So they want to keep that tradition going, because they want to keep institutionalized slavery alive and well." (*Kennedy, 2009*).

This view in connection to whites keeping slavery alive results in a civil rights setback (mass incarceration) for the treatment of black people from the white racial frame of mind. When making discretionary decisions a critical choice leads to holding black people back from the same liberties, they were provided during the civil rights movement. "Mass imprisonment is helping to create and legitimate a whole new understanding of citizenship and belonging. Former felons risk losing not only the right to vote but also are subject to other acts of civil death that push them further to the political, social, and economic margins. Many former felons forfeit their right to serve on a jury and are ineligible to receive pensions, disability benefits, veterans' benefits, public housing, student loans, or food stamps. States prohibit former offenders from working in scores of professions, including plumbing, palm reading, food catering, and even haircutting, a popular trade in many prisons" (Taslitz, 2011). This statement is critical to understand because due to this way of limiting African Americans this helps to support the views of the white racial frame. The fact that ex-felons are not allowed to serve on juries provides an understanding and support for the criminal justice system remaining in the hands of people who make discretionary decisions through the white framing model. This takes away civil rights that black people fought for so diligently during the civil rights movement. This limitation is masked through the second factor tough on crime policies.

### **Tough on Crime**

The following quote will show a parallel to excuses used by the criminal justice institutions (systemic racism) to justify the importance on mandatory sentencing and laws that are enacted to increase possible discretionary decisions of judges that are differential. What is striking about the persistence of racial disparity through the prison boom era is that state and federal governments restructured their criminal codes throughout the 1970s, 1980s, and 1990s in an attempt, at least in part, to reduce unwarranted disparities. Throughout this period, states categorized offenses into classes or adopted sentencing guidelines, abolished or limited parole, and adopted “piece meal” policies like mandatory terms and sentencing enhancements. Although many of these policies were enacted as tough-on-crime policies designed to increase severity, they were simultaneously designed to decrease disparity by decreasing judicial discretion. (Schlesinger, 2011).

These laws are seen as a means of limiting judicial discretion as discussed in the previous chapter. The laws that are in place however are racialized in themselves. Schlesinger (2011) argues, “Although limiting judicial discretion may be able to limit the effect that race, per se, has on criminal justice outcomes, mandatory terms and sentencing enhancements increase punishments for a number of traits and behaviors, like living in public housing or possessing a weapon, that are strongly correlated with race. As such, these laws may increase racial disparities through formally colorblind mechanisms.” This provides a white racial framed victory of the criminalized system due to trickery. The public are provided a mock belief in the systems in place helping in the area of disparities (limiting judicial discretion) when in fact these laws are not only working from the white framing model they are also using a mode of interest convergence. By passing these laws whites in power (police officers, prosecutors, and judges) are providing the view of working in the best interest of the public while they are actually looking into the interest of their white counterparts in the criminal justice system.

The following studies as well as other findings will provide explanations on how powerful white court actors (judges and prosecutors) apply the tough on crime policies that are in place at disproportionate rates. Through the mandatory tough on crime sentencing laws that were attempting to limit judicial discretion the findings of the study, conducted by Schlesinger, provides proof these limited discretionary laws still possess a white racial frame component. Allowing judges to sentence black men at a higher rate to mandatory and tough prison time versus the lesser sentences provided to white men. This study examined the adverse and differential results on prison admissions at state-level prisons for black and white men. They found tough on crime, mandatory terms, and sentence enhancements prove to disproportionately increase the admission rates of black men. Other studies conducted (Crawford, Chiricos, & Kleck, 1998, Farrell, 2003, and Vincent & Hofer, 1994) have provided findings of adverse effects for black men as well. They have found the application of these mandatory sentencing terms are more likely to be applied to black defendants at the discretion of attorneys discretionary power (discussed in detail in previous chapters) and through the discretionary sentencing power of judges (as discussed in previous chapters).

Previous studies have found, black offenders in are sentenced as habitual offenders at a higher rate than whites despite the cases being similar. These studies provided an extent to which these powerful social actors were still provided a level of discretionary power to shape outcomes through these policies that were designed to limit their disproportionate discretionary power in the criminal justice system. Sturr (2006) found, "Tough on crime" policies in general have also contributed to the prison boom. Throughout the 1980s and 1990s, states and the federal government adopted mandatory minimum sentences, including "Three Strikes" laws that mandate long sentences for a third felony conviction.

### **Three Strikes Laws**

“Both sentencing enhancements and mandatory terms mandate increased punishments for traits that black people are more likely to have (like being in public housing) or behaviors they are more likely to engage in (like having a firearm).”

(Schlesinger, 2011). According to Schlesinger, “The majority of sentencing enhancements increase offenders’ sentences if they have a prior conviction for the same offense, carry a firearm at the time of the offense, or commit the offense while in or near certain public spaces.” This law was created with the inequality of discretion (discussed earlier in the chapter) in mind. When black people find themselves at the brunt of discretionary decisions being made from the white framing model they are destined to suffer from the exercise of mandatory laws. According to the Bureau of Justice statistics (2008), black offenders have substantially longer and more serious prior records than their white counterparts. These findings make the consequence of differential treatment through discretionary decisions being made from white social actors’ detrimental to black offenders. The laws created for the purpose of three strike laws can be shown as having a racial component and consequence greater for black suspects than any other race. Part of this creation of laws through viewing blacks from the white racial frame of mind is imperative. The creation of the war on drugs is the third important factor to describe the effect of mass incarceration for black men. I will begin this discussion with a brief historical overview followed by the creation of the war on drugs being intentionally created by whites.

### **History of the War on Drugs**

The war on drugs was born during the time of the world transitioning towards rapid social change (Hall, 1997). This war began with the election of President Nixon through his declaration that drugs were largely our “public enemy number one.” He was followed by Ronald Reagan who used the condemning of “welfare queens” and “criminal predators” to show his support to whites who felt betrayed by a political party catering to the civil rights agenda (Alexander, 2010). The uses of these terms coined by President Ronald Reagan were followed by the visual perception (media depictions) of African American men and women. These perceptions gave a look into the war on drugs being equivalent to a “black” problem. The ideological view of the right wing Republican Party as appealed by President Reagan was, “the emotional distress of those

who fear or resent the Negro, and who expected President Reagan somehow to keep him ‘in his place’ or at least echo their own anger and frustration” (Alexander, 2010).

Between the years of 1985 and 2000, drug offenses counted for two-thirds of the inmates in federal facilities and more than a half of inmates in the state prisons. Since the drug war began an increase of approximately 31 million people have been arrested (Alexander, 2010). This increase has been primarily among African American men. 2 out of 5 African Americans who entered the prison system were convicted of a drug offense. This rate is comparable to the 1 in 4 for their white counterparts. Prison sentences obtained because of the war on drugs has quadrupled accounting for the boom in the prison system we see today (Alexander, 2010).

### ***War on Drugs***

One possible explanation (to explain the war on drugs) is uncomfortably close to racism: officials knew that blacks would disproportionately suffer but did not care. For reasons of political self-interest, ideology, or partisanship, they enacted disparity-causing policies anyway. At least for some policy makers, this is what happened. They acted as if it were more important to score political and ideological points than to worry about the effects on individual human beings of the policies they promoted. Similar things have happened in many policy realms in recent decades, and there is little reason to doubt that it happened in relation to drugs and crime. (Tonry, 2010).

This section shows Tonry looking into the notion that policymakers could have reacted out of a racism point of view but he expresses this is only the act of some policymakers and it is merely close to a racist reaction. He does not focus on the reasons these racism views may be possible and why he has come to this conclusion. My look into the systemic racism approach provides a theoretical touch for why these powerful white decision makers may have made the decisions in a racially motivated fashion when looking at the system through the white racial frame of mind. The war on drugs led to a number of laws that were in place through the systemic racist criminal justice system in place. These laws as grounded from discriminatory discretionary decisions to increase mass incarceration of black men.

The white powerful thinkers in the criminal justice system use the realm of the law similar to the way in which law was used to construct the slavery system. This makes the advent of the war on drugs as a means of targeting consciously the black man not much different from what we have historically seen. Nunn states "law was used at each step in the conquest and enslavement of African and other native peoples. Nothing has been done without the laws guiding hand to regulate, manage, and control. Whenever European American majority in the United States desires to ostracize, control, or mistreat a group of people perceived as different, it passes a law." (Tonry, 2010). This leaves support to the war on drugs being a relevant decision of incorporating the mass imprisonment of black men through a law being passed to insure whites remained at the top while holding down black men.

Wacquant (2000) states, the effects of the war on drugs expanded the racial disproportionality in the prison systems. "In 10 of the 38 states in which this black-white disparity has grown, African Americans are imprisoned at more than ten times the rate of their counterparts of European origin." One major contribution to the mass incarceration era is the laws, sentencing policies, and enforcement initiatives that were created to reduce drug abuse. The reason for the creation of the war on drugs is highly argued in research. One clear and agreeable fact is the war on drugs has ostensibly contributed to the massive increase in incarceration of black men.

## **Conclusion**

This chapter provided a glance into the broader consequences in relation to the vast penal system in the United States. These findings showed one of the many detrimental impacts to making discretionary decisions through aspects of the white framing model as detrimental to the future of African American men. The alternative for most men was discussed as leading them to prison and viewing them as criminal as a key aspect.

Another aspect discussed in this chapter was the impact and growing inequality for black people chosen (through inequality in discretion) to serve time. This inequality was discussed in the aspect of all three levels of powerful social actors —police officers, prosecutors, and judges—. The inequality through police discretion was discussed in

relation to the police officers view of discretion through racial profiling and traffic violations leading discretionary decisions that affect black men at a largely disproportionate rate. The case of *Whren vs. US* was addressed. The police officers were discussed as racially profiling the black men (Whren and Brown) in a known “high-drug” area. The case contended the officers would not have suspected or pulled over the defendants for suspicion and probable cause at the officers’ discretion if they would have been white. The findings in the Whren case among others were discussed to support the same results of inequality in discretionary decisions made by police officers. These cases include but are not limited to *Fuchilla v. Layman (1988)*, *State v. Pedro Soto (1996)*, *Lundman and Kaufman (2008)*, and *Smith and Petrocelli (2001)* to name a few.

The prosecutor’s discretion of inequality through discriminatory discretionary decisions was discussed. The power of the prosecutor to charge the black men due to higher convictability was provided as an example of how the prosecutor can react to charging a black man with a crime even though they were not the actual assailants. The case of the prosecution of Sammy Thomas and his brother Willie Gene, both African-American men was discussed as an example of charging black men due to high convictability. The prosecutors’ won by convicting the men despite a secret eyewitness statement (provided to the prosecutor) from the victim's brother exonerating the men of the crime. This case provided a clear-cut classic example of the view of the prosecutor from the frame. In support of the frames view of the black man as criminal, and his life as less valuable than the life of a white man regardless of the black man being innocent of the crime committed.

The inequality through the discretionary power of the judge was also discussed. The discretion of the judge to sentence a black man for committing a crime against a white person at a higher and harsher rate to show the level of inequality when exercising their (judges) discretion. This view of the judge from the white racial frame of mind, which deems black lives as less valuable than whites, shows through the discretion of the judge when providing harsher sentences was explored. When viewing cases from the white framing model the sentencing of the judge in a case where the suspect is a black man and

the victim is a white person makes the ruling more likely to be in favor of the death penalty for the suspect. The case of *Wesley E. Baker v. State* was provided. This case was provided to demonstrate the lack of concern of sentencing a defendant in a fashion that can be deemed as cruel and unusual as well as unequal. The case showed a judge is more likely to react from a human point of view when sentencing a white person versus a white framed critical view (giving a sentence that is harsher and consists of the fullest extent of the law) taken when sentencing a black person.

The last impact leading to mass incarceration for black men was discussed through the discussion of components. The phenomenon discussed were the aspects of governing through crime (three strikes law, tough on crime, and truth in sentencing), and a small synopsis of the impact and historical view of the effect of discretionary decisions (through the snatching of civil rights) that were rooted from a white racial frame of mind in relation to the war on drugs.

The aspect of governing through crime (three strikes law, tough on crime, and truth in sentencing) was discussed. This view of discretionary decisions being made from the minds of powerful social actors was discussed as a critical aspect for understanding the phenomenon known as mass incarceration. The case of Jena 6 provided in relation to how mass incarceration's creation was crucial and unequal to black men. The case involved nooses hung under a tree (in reference to slavery days where slaves hung from nooses). Six black athletes found themselves being charged for a case of attempted murder charges and conspiracy. This view was provided in connection to whites keeping slavery alive and well making a historical view for the treatment of black people from the white racial frame of mind when making discretionary decisions a critical choice. When discussing the taking of civil liberties, they were provided during the civil rights movement. This connection can support my claim (lone contribution) that mass incarceration is a covert form of slavery.

Mandatory tough of crime sentencing laws were discussed as allowing judges to sentence black men at a higher rate to mandatory and tough prison time versus the lesser sentences provided to white men. These laws were discussed to show the three strikes



laws lead to mass incarceration of black men due to the laws being discriminatory. This chapter also discussed the three strikes law. This law states the majority of sentencing enhancements increase offenders' sentences if they have a prior conviction for the same offense, carry a firearm at the time of the offense, or commit the offense while in or near certain public spaces. This law was discussed as creating the inequality of discretion (discussed earlier in the chapter) in mind. When black people find themselves at the brunt of discretionary decisions being made from the white framing model they are destined to suffer from the exercise of mandatory laws.

A brief synopsis was provided on the historical aspect of the war on drugs in relation to a contribution to mass incarceration. The effect of the war on drugs was discussed as an expansion of racial disproportionate rates in prisons. As a look into major contributions to the mass incarceration era, this study found the laws, sentencing policies, and enforcement initiatives were created to reduce drug abuse were large contributors.

## CHAPTER V

### CONCLUSION/SOLUTION

My study provided a new gap filling connections to the field. Theoretical linkages of discretionary decisions made from a white perspective in the criminal justice. A glance into “who” these powerful white actors (police officers, prosecutors, and judges) are was provided. I gave a glance into the formal process that is a daily process for white powerful actors in the criminal justice system.

The formal process of the police officer was provided as a four-stage process of decision making initial contact, investigation, arrest, and custody. These four stages were discussed and connected to the mode of thinking process of white powerful actors when making discretionary decisions through the white framing model. My contribution to the field by providing this linkage gave evidence through examples (timetable of this process, actions when the Drug Enforcement is involved, and the effect criminalizing the black man can have). This contribution made way of insight into the role and discretionary power possessed by police officers.

The formal process of the prosecuting attorney was also provided. The filling of the much-needed connection to the prosecutors thinking from a white framing model was provided. The stages of the prosecutorial process that holds levels of discretion were detailed. These five stages were charging, preliminary hearing/ grand jury, arraignment, bail/detention, and plea bargaining. The first stage was noted as the stage involving the leeway (with a focus on minor and serious crimes) for the attorney’s bias and own specific interests to become a factor in their decision making. The preliminary hearing/grand jury stage was also explored. At this stage the problematic factors of thinking from the white racial frame of mind was discussed. Prosecutors’ discretionary bias played a major role. The prosecutor was described as having the option at this stage to defend a number of options of crimes and having probable cause to charge the defendant. The next crucial stage discussed was the arraignment and bail/detention stages. The plea bargaining stage was discussed as a crucial point in the prosecutors’ process. There were examples provided showing the effects of plea-bargaining that can

be detrimental when being viewed from the white racial frame. The example provided of the drug bust in Hearne (Erma Faye Stewart and Regina Kelly) provided insight into a case that was detrimental when the prosecutor was viewing things from a white racial frame of mind. These defendants were convicted of a crime despite the other defendants in the case being exonerated. This fallacy of justice was discussed in relation to a misuse of discretionary power of the prosecutor to convince them to plea.

In the event the prosecutor does not choose to plea bargain the case and decides to go through with a criminal trial the next level in the discretionary process provided was the level of judicial discretion. There were three steps provided in this essay taken by the judicial process trial/adjudication, sentencing/disposition, and appeal/post-conviction remedies. The trial / adjudication stage was discussed as the stage when the defendant is tried before either a judge (bench trial) or a jury. The sentencing/ disposition process is noted as the stage in the discretionary process that has limited judicial discretion due to possible sentencing guidelines that are mandatory. The last stage of appeal/ post-conviction described the finding of the defendants constitutional rights violated and did not receive fair treatment the appellate court has the option to rule whether the appeal has merit. These processes were discussed as holding a great amount of discretionary power by the judge and detrimental to blacks.

There was an emphasis provided for “why” the focus on these discretionary actors was discussed in this essay. The addition of the need to provide a theoretical approach towards understanding a focus on the impact of the role systemic racism plays in the criminal justice system was discussed. This need was expressed through providing key factors to describe the provisions of the criminal justice system as differential in its treatment for African Americans.

The importance of knowing “who” these powerful social actors are was provided. Insight into the role of social actors (judges, prosecuting attorneys, and police officers) when making decisions that will ultimately effect who is in the criminal justice system was provided. Once the “who’s” were established there were specific examples provided for the outcome for blacks when decisions were made from this frame. Thinking from

the white racial frame of mind in the *Terry v. Ohio* case providing a stop and frisk rule gave insight into the thinking of these actors. This case allowed police officers a considerable amount of discretionary power. This case stands for the proposition that police can stop a person so long as they feel they have probable cause even in the absence of a search warrant that is a constitutional right. This case was described as allowing black people to be stopped more often from the white framing model. This frame supports the view of blacks as automatically criminal, dangerous, and suspicious. This study provided significant information on the racially motivated minds of these decision makers' by providing a glimpse into theoretical aspects. These connections were made through the provision of the dimensions, historical view, role played in discretionary decisions of the aspects of systemic racism, the white racial frame, the interest convergence principle, and Eurocentric law. The combination of one or more of these aspects was defined as the white framing model.

Systemic racism was discussed as encompassing white-racist dimensions. These dimensions of emotions, attitudes, habits, as a part of the institutions controlled by whites in this society were discussed. The criminal justice system was defined as an institution that operates in a systemic manner with clear racial divisions and lines drawn. Statistics were provided to show the inequality and the discretion made by white social actors when making arrests. These unequal arrest rates for drug crimes provided clarification of the system in place through the demonstration of inequality in drug use in suburban areas going unchecked, underreported, and ignored through the exercise of discretion of white social actors. This essay provided an emphasis on the emotion-laden stereotypes that are the emphasis of systemic racism and can influence discretionary decisions. The stereotypes of the bestial and apelike appearance, uncivilized, alien, foreign, criminal, dangerous, and rebellious aspects of the black man were the focus. These stereotypes were discussed as remaining images of black criminality. Adhering to these stereotypes was discussed as providing white minds the ability to react accordingly in the criminal justice system through discretion. The theoretical aspect of this study through the systemic racist aspect provided a focus on the white mind. This became a

foundation for the criminal justice system and social actors today. The focus of the white mind was discussed as the provision of a psychological approach demonstrating the manner in which the white framing model encompasses the white racial frame of mind of powerful social actors.

The dimensions of the white racial frame were discussed. This way of thinking was discussed as having a great impact on the making of discretionary decisions by white social actors. When acting from the clouded mindset these actors were discussed as providing a psychological modifier for the way in which the minds and views of this white racial frame can be instilled in the minds of society. An example from a case of the U.S. attorney's office was provided to show a description of thinking from this frame of mind. In an all too often case of drug offenses the view from a prosecutorial discretionary point was given as being from a racialized lens. The prosecutor wanted to drop the charges against the white offender due to him being a good ol' boy. From the white racial frame perspective of whites as pure and blacks as inferior, this perspective was provided from a white racial frame of mind of the prosecutor in his decision to give the offender a break.

This study focused on the foundational piece of the Eurocentric law based from which powerful white actors' base their discretionary decisions. This piece was discussed as the legal tradition dealing with the way laws are made, the people who administer them, and the way in which these laws are operated. This piece was discussed as an expression of the ways in which the laws are interpreted and how this interpretation can result in unequal rights for African Americans. The discussion of the historical aspect of the law by Kenneth Nunn asserting within society, there is no higher authority than that of the law, which is a white mans' creation. With the creation of the law, the European male was described as becoming a self-policing entity-one that need answer to no other. This view was discussed as providing a connection between the distancing of man (powerful white actors) from the creator (also viewed as powerful white social actors) and providing them the option of looking out for their own self-interest.

These discussions lead to the addition of the view of Derrick Bells' interest convergence from which powerful social actors base their discretionary decisions. Interest convergence is a key addition to this study and the discipline alike to stress racial equality and equity for people of color will be pursued and advanced when they converge with the interests, needs, expectations, and ideologies of whites when the power is provided in making discretionary decisions. The addition of this view will show support for the white framing model of thinking of powerful social actors (police officers, prosecutors, and judges) when making these discretionary decisions as effecting blacks. The rights of African Americans, or people of color, are recognized and protected when and only as long as whites perceive that such advances will further the interest of whites, which is their primary, concern provides support for this projects contribution to indict these white social actors. A missing component to the field.

A view into discretion when these decisions are unjust and discriminatory was provided to demonstrate how these reactions can lead to a white framing model view. An example in the research characterizing discretion as a notion of a "black hole" in the language when studying was provided. The understanding of discretion as exercising wisdom, power, and decision making were provided. This example was stated as giving a clear view how thinking through a white racial frame can result in inequality for blacks due to their lack of power in a systemic institution (criminal justice system) that deems them powerless.

Police discretion was discussed as being effected by the factors of the rule of law, their involvement in SWAT teams, stop-and-frisk rights, driving discretion, racial profiling, and racial disparities. These influences were said to have been the driving force behind negative consequences for blacks when guided through the white racial frames of mind of police officers. The rule of law was discussed as providing a negative influence on police when making discretionary decisions when lawmakers view things from the white racial frame of mind. The involvement of police in swat teams was also addressed. The provision for police to have military incentives and weaponry was stated as an allowance of police to act on views of discretion through their beliefs in the white

racial frame of mind. These reactions were supported from the prior example given in the *Terry v. Ohio* case and Operation Pipeline. The proof provided was also stated to have had a skyrocketing effect on the amount of drug arrests by Swat teams in urban housing projects. The misuse of discretion by police in the allowance of stop-and-frisk and driving while black were discussed. The cases of *Florida v. Bostick* and research conducted by Bowser were given to provide evidence of the delegation of a badge of suspicious and criminal, for the black man, when making discretionary decisions through a white framing model. The discussion of racial disparities provided insight into Tonry's view of the interest of white being a concept used by police officers in relation to the theoretical aspect of Derrick Bell's interest convergence. In the discussion of racial profiling statistical discrimination and numerical arrests rates were provided to support the claim of police officers discretion have a negative effect for black men versus their white counterparts.

The discretion of the prosecutor was discussed. The prosecutors' discretionary ideology was discussed as being viewed from two perspectives. These perspectives were positive (from the prosecutors' perspective) and negative (through their actions against blacks) power. Positively they (prosecutors) were discussed as being given passes through legal rules such as the "harmless error rule." This rule was described as providing prosecutors a pass through the provision of appellate courts affirming convictions if the evidence supports the defendant's guilt, despite the defendant not receiving a fair trial. This rule was discussed as permitting the engagement of prosecutors' use of misconduct as long as the evidence of the defendant's guilt is clear, the conviction will be affirmed. The negative aspect of this discretionary power through the white racial frame of mind leads to misconduct against black defendants. These miscarriages were discussed in relation to factors that have an influence on the prosecutor's decision-making process (system factors, case factors, disposition factors, and political factors), and presidential pardons. These factors were discussed as providing prosecutors the power to make decisions based on their own discretion. When these decisions are made from the white framing model black defendants (some

examples provided include Chibueze Okorie and Christopher Lee Armstrong) were discussed as being more convictable and more likely to be taken to trial despite their cases being similar to the cases dismissed by white defendants.

The discretionary power of judges was also discussed through describing the judge as the senior officer in a criminal case. The judge was discussed as having the power during the trial to rule on appropriateness of conduct, settles questions of presented evidence, settles questions of procedures, and guides the type of questions allowed for the witnesses. This power was discussed as problematic if the judge is viewing the defendant from the white racial frame of mind. The example provided of the defendant, a young black man, appearing in court in a way the judge did not see as acceptable allowed the judge to immediately establish the fact that the defendant was not a poor defenseless victim of life in the ghetto but part of a pack of remorseless young felons. This example was provided as insight into not only the discretionary power of the judge but also, how the judges' view from the frame can alter his decision of black offenders.

The impact of these discretionary decisions was addressed. A historical foundation of the criminal justice system was provided. The difference in making discretionary decisions by white social actors through the white framing model was addressed. The white men (Bryant and Milam) whom murdered Till were fully acquitted of their charges. Emmett Till whistled at a white woman and received a punishment of death. This example was provided as a foundational view of the inequality of the criminal justice system in the punishments given which can lead to mass incarceration of black men.

The doctrine "equality before the law" is discussed. This doctrine was presented as the ideal views into equality in policy form while totally the opposite in practice. Blacks were discussed as being treated in an inequitable fashion when viewing the discretionary decisions being made from police officers (traffic stop discretion), prosecutors (convictability), and judges (harsher sentences). The *Whren v. U.S.* case was discussed. This case provided insight into the discretionary decisions of police officers to stake out and stop blacks in a high drug area as a violation. This example provided insight into



police officers' actions when looking through the white racial frame of mind leading to one assumption. This assumption being the suspects in the Whren case would not have been suspected or pulled over for suspicion and probable cause at the officers' discretion if they would have been white. The prosecutors' discretionary decisions of inequality were also addressed. The case of Sammy and Willie Gene Thomas was presented. This case convicted innocent black men despite the actual killers being white men. This was provided as a clear-cut classic example of the view from the frame. In support of the frames views of the black man as criminal, and their (Sammy and Willie Gene Thomas) lives as less valuable than the life of a white man regardless of the black men being innocent of the crime committed. The inequality through the discretionary power of the judge is also discussed. The case of Wesley E. Baker v. State was discussed. The discretion of the judge to sentence Wesley, a black man, for committing a crime against a white person resulted in a harsher punishment was addressed. This study found despite his horrific childhood the judge made the discretionary decisions to uphold his death penalty sentence regardless to the finding of a higher rate of death penalty convictions for blacks whom commit a crime against whites.

The power of discretion was shown as important and crucial to the outcome of cases when looking into the inequality in the criminal justice system. These decisions were discussed as leading to incarceration of blacks at a disproportionate rate. The ultimate result was discussed as mass incarceration. There was a focus on three critical factors. These factors were the historical connection when making decisions, tough on crime laws (three strikes...), and the war on drugs. The historical connection discussed the loss of previously fought for civil rights in relation to the Jena 6 case. The tough on crime laws were discussed as a means of powerful white social actors to maintain power and possibly limit judicial discretion. Studies were discussed as having the opposite effect but actually provided a more adverse effect to incarcerate black men. All of these aspects were discussed as contributing to the mass incarceration of black men. A brief explanation and history of the war on drugs was provided to connect the last factor of white racially framed discretionary decisions made. A look into the systemic racism

approach provided a theoretical touch for why these powerful white decision makers may have made the decisions in a racially motivated fashion when looking at the system through the white framing model. The war on drugs was expressed as leading to a number of laws that were in place through the systemic racist criminal justice system in place. These laws were stated as being grounded from discriminatory discretionary decisions resulting in the mass incarceration of black men.

A combination of these chapters provided a connection to the white framing model through powerful social actors. The older period of discrimination through the role of powerful white social actors— police officers, prosecutors, judges— deemed results of an overt public discriminatory nature. After the civil rights and Jim Crow eras, these new systems of racial disparities in the criminal justice system have been replaced with a new system. A system of a covert nature to the untrained or intentionally ignored fashion. A system of modern systemic racist (discussed in detail in the first chapter), white racial framed (also discussed in detail in the first chapter), interest convergence (discussed in detail in the first chapter), or through Eurocentric law practices (discussed in detail in the first chapter). The criminal justice system was found to entail racial inequality being maintained and produced in covert ways (by whites) through race neutral policies, practices, and ideologies (such as the current criminal institution currently in place). All of these aspects provided a clear filling of a major gap in the literature from my research perspective providing my own contribution to the discipline, white framing model, that has yet to be addressed previously.

### **Solutions/Critical mass**

The Solution to changing these systemic institutions and mode of thinking from the white framing model is the provision for a critical mass of blacks in powerful social acting positions. This thesis has provided a view into the effects the lack of a critical mass has on the criminal justice system currently in place. When critical amounts of blacks are in the positions to make discretionary decisions they will gain a level of influence in decision making. This influence will allow for a certain level of resistance resulting in a change to white framing decisions. A critical mass will require whites

‘attention to the need for change in the criminal justice system and encourage them to look at discretionary decisions in a more critical fashion. McKenzie, a former Brooklyn prosecutor and past president of the National Black Prosecutors Association (NBPA), states, “diversifying and increasing the ranks of prosecutors of color, particularly in supervisory positions that carry greater discretionary power, will have a more significant impact on fighting disparities and promoting equal justice than election of state attorneys general of color.”(Valbrum, 2012). This quote supports the need for an increase in the critical mass of African Americans in order to receive change to the disproportionate amount of African Americans in the criminal justice system. Kamala Harris, a black district attorney, also agrees there is a need for a critical mass to promote and obtain change. She states, “One of the fundamental requirements in building a fair and just criminal justice system is ensuring that from top to bottom that system is representative of the communities it is mandated to protect,” (Valbrum, 2012). The increase in the number of African Americans in powerful social acting positions will provide resistance and result in change for African Americans across the board. Although this is a viable solution, there is another solution at hand, implementing programs.

### ***Programs***

Some programs can be implemented from prosecutors to ensure they have more equality in the discretionary decisions being made. “For many years, communities of color have been frustrated by the apparent willingness of prosecutors to turn a blind eye to the ways in which their exercise of discretion causes unjust racial disparities in charging and sentencing, improper systematic exclusion of African Americans and Latinos from service on criminal juries, and unconscionable wrongful convictions,” says Christina Swarns, director of the Criminal Justice Project of the NAACP Legal Defense & Educational Fund (Valbrum, 2012). Attorneys Kamala Harris, Craig Watkins, and Seth Williams have implemented programs in a fight to change the inequality of the system. Craig Watkins has implemented a program of conviction integrity unit. This unit was successful in reviewing more than 400 convictions involving DNA evidence and found over a dozen were a result of wrongful convictions. Kamala Harris has an idea to

be smart on crime versus the usual fight to avoid being soft on crime. She is attempting to build a legacy of adoption for these smart policies. She is attempting to focus on back-end enforcement through strict accountability while simultaneously providing early intervention from the front-end. These three attorneys are known as forming a triumvirate. These programs have a stronger possibility of being implemented if a critical mass is present. These efforts are not yielding change due to the lack of a critical mass to enforce these programs being implemented. Success of these programs can possibly provide for a change in the criminal justice system and provide a feasible solution to the criminal injustice system currently in place.

## REFERENCES

- Alexander, M. (2010). *The new Jim crow: Mass incarceration in the age of colorblindness*. New York, NY: The New Press.
- Anderson, E. (2008). *Against the Wall: Poor, Young, Black, and Male*. Philadelphia, PA: University of Pennsylvania press.
- Barkan, S.E. (2009). *Criminology: A sociological understanding*. Upper Saddle River, NJ: Prentice Hall.
- Bell, D.A. (2005). The unintended lessons of Brown v. Board of education. *New York Law Review*, 49, 1053-1067.
- Bell, D. A. (2008). Racial equality: Progressives' passion for the unattainable. *Virginia Law Review*, 94, 495-520.
- Bolton, K. & Feagin, J.R. (2004). *Black in blue: African American police officers and racism*. New York: NY: Routledge.
- Bonczar, T. P. (2003). *Prevalence of imprisonment in the U.S. population, 1972–2001: A report from bureau of justice special report*. Washington, DC: US Department of Justice.
- Bowser, B.P. (2007). *The black middle class: Social mobility and vulnerability*. Boulder, Co: Lynne Rienner Publishers.
- Brown, E. (2002). *The condemnation of little B*. Boston, MA: Beacon Press.
- Crowe, C. (2002). *The lynching of Emmett Till*. New York, NY. Retrieved from [http://jimcrowhistory.org/resources/lessonplans/hs\\_es\\_emmett\\_till.htm](http://jimcrowhistory.org/resources/lessonplans/hs_es_emmett_till.htm).
- Davis, A.J. (2007). *Arbitrary justice: The power of the American prosecutor*. Oxford, UK: Oxford University Press.
- Feagin, J.R. (2006). *Systemic racism: A theory of oppression*. New York, NY: Routledge.
- Feagin, J.R. (2010). *The white racial frame: Centuries of racial framing and counter-framing*. New York, NY: Routledge
- Feagin, J.R. & Cobas, J.A. (2008). Latinos / as and white racial frame: The procrustean bed of assimilation. *Sociological inquiry*, 78, 39-53.

- Forde- Mazrui, K. (2007). Ruling out the rule of law. *Vanderbilt Law Review*, 60, 1497-1557.
- Goluboff, R. L. (2007). *The lost promise of civil rights*. Cambridge, Ma: Harvard university press.
- Goode, E. (2002). Drug arrests at the millennium. *Social science and public policy*, 39, 41-45.
- Gross, S. & Barnes, K. (2002). Roadwork: Racial profiling and drug interdiction on the highway. *Michigan Law Review*, 101, 653- 751.
- Hall, M.F. (1997). The “war on drugs”: A continuation of the war on the African American family. *Smith College Studies in Social Work*, 67, 609-621.
- Hernandez-Murillo, R. & Knowles, J. (2004). *International Economic Review*, 45, 959-989.
- Human Rights Watch news. (2008). *U.S.: ‘Drug war’ unjust to African Americans*. New York, NY: Human Rights Watch.
- Ifill, S.A. (1997). *Judging the judges: Racial diversity, impartiality and representation on state trial courts*. Boston, MA: Boston College Law Review.
- Kaufman, J.M., Rebellon, C.J., Thaxton, S., & Agnew, R. (2008). A general strain theory of racial differences in criminal offending. *The Australian and New Zealand journal of criminology*, 41, 421-437.
- Kennedy, J.E. (2009). The Jena 6, mass incarceration, and the remoralization of Civil Rights. *Harvard Civil Rights-Civil Liberties Law Review*, 44, 477-509.
- Linzer, D. & LaFleur, J. (2011). *Shades of mercy: Presidential forgiveness heavily favors whites*. Retrieved from [http://www.truthdig.com/report/item/shades\\_of\\_mercy\\_presidential\\_forgiveness\\_heavily\\_favors\\_whites\\_201112041/](http://www.truthdig.com/report/item/shades_of_mercy_presidential_forgiveness_heavily_favors_whites_201112041/).
- Loury, G.C., & Western, B. (2010). The challenge of mass incarceration in America. *Daedalus*, 139, 5-9.
- McDonald, D., & Carlson, K. (1993). *Sentencing in the federal courts: Does race matter?* Washington, DC: U. S Department of Justice Statistics.

- Miethe, M. D., & Moore, C. A. (1986). Racial differences in criminal processing: The consequences of model selection on conclusions about differential treatment. *The Sociological Quarterly*, 27, 217-237.
- National Institute of Justice. (2010). *The source of crime and justice data*. Retrieved from <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/6708/detail>.
- Nickels, E.L. (2007). A note on the status of discretion in police research. *Journal of Criminal Justice*, 35, 570-578.
- Nunn, K. B. (1997). Law as a Eurocentric enterprise. *Law and Inequality*, 15, 323-371.
- Piquero, A. R. (2008). Disproportionate minority contact. *The Future of Children*, 18, 59-79.
- Schlesinger, T. (2011). The failure of race neutral policies: How mandatory terms and sentencing enhancements contribute to mass racialized incarceration. *Crime and Delinquency*, 57, 56-81.
- Senna, J.J., & Siegel, L.J. (2008). *Introduction to criminal justice*. Canada: Thomson Wadsworth.
- Sturr, C. (2006). The political economy of the prison crisis: An introduction. *Dollars and sense*, 263, 8-9.
- Taslitz, A.E. (2011). Mass incarceration: Causes, consequences, and exit strategies: The criminal republic: Democratic breakdown as a cause of mass incarceration. *The Ohio state journal*, 133.
- The Oyez Project at IIT Chicago-Kent College of Law. (2012). *United States v. Armstrong*. Retrieved from [http://www.oyez.org/cases/1990-1999/1995/1995\\_95\\_157/](http://www.oyez.org/cases/1990-1999/1995/1995_95_157/).
- The Sentencing Project. (2008). *Disparity by Geography: The war on drugs in America's cities*. Retrieved from [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=186](http://www.sentencingproject.org/detail/publication.cfm?publication_id=186).
- The Bureau of Justice statistics. (2008). *Office of justice programs*. Retrieved from <http://bjs.ojp.usdoj.gov/index.cfm>.

- The United States census bureau 2012 statistical abstract. *Employed Civilians by Occupation, Sex, Race, and Hispanic Origin*. (2010). Retrieved from [http://www.census.gov/compendia/statab/cats/labor\\_force\\_employment\\_earnings.htm](http://www.census.gov/compendia/statab/cats/labor_force_employment_earnings.htm). Retrieved October 13, 2011.
- Tillyer, R., Engel, R.S., Wooldredge, J. (2008). The intersection of racial profiling research and the law. *Journal of Criminal Justice*, 36, 138–153.
- Tokaji, D. P. (2003). First amendment equal protection: On discretion, inequality, and participation, 101. *Michigan Law Review*, 2409.
- Tonry, M. (1994). Racial politics, racial disparities, and the war on crime. *Crime and Delinquency*, 40, 475-494.
- Tonry, M. (2010). The social, psychological, and political causes of racial disparities in the American criminal justice system. *Crime and Justice*, 39, 273-312.
- Tonry, M. (2011). *Punishing race: A continuing American dilemma*. Oxford, UK: Oxford University Press.
- Valbrun, M. (2012). *California AG with new ideas on how to fight crime*. *America's Wire*. Retrieved from <http://americaswire.org/>.
- Wacquant, L. (2000). The new 'peculiar institution' on the prison as surrogate ghetto. *Theoretical Criminology*, 4, 377-389.
- Wacquant, L. (2010). Deadly symbiosis: When the ghetto and prison mesh and meet. *Punishment & Society*, 3, 95-133.
- Wolfe, T. (1987). *Bonfire of the vanities*. New York, NY: Franklin.



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